LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 18 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

276

[redacted] 1970

PETER PARIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETER PARIS,
Petitioner.

9038 Grant Building,
Pittsburgh, Pa. 15219.

Murrette Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

INDEX

	Page
Appendix to Petition for Writ of Certiorari to the Superior Court of Pa.:	
Opinion	2
Opinion of Superior Court of Penna.	20
Opinion of Supreme Court of Penna.	20

Case Caption

IN THE SUPREME COURT OF THE UNITED STATES

No. 1708 October Term, 1969

PETER PARIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

IN THE COURT OF QUARTER SESSIONS OF WASHINGTON COUNTY, PA.

No. 229 September Sessions, 1967, Q.S.

COMMONWEALTH

vs.

PETER PARIS

No. 228 September Sessions, 1967, Q.S.

COMMONWEALTH

vs.

ROBERT RAY RAGAZZINI

Appendix—Opinion

No. 227 September Sessions, 1967, Q.S.

COMMONWEALTH

vs.

MICHAEL J. EVANS
MARION JOSEPH SERAFIN

Argued before: Sweet, P. J., McCune, J., Curran, J.
(June 17, 1968)

Appearances

Arnold W. Hirsch, Special Assistant Attorney General, representing Commonwealth.

Allen N. Brunwasser, Esq., John P. Liekar. Esq., and Michael E. Kusturiss, Esq., representing Peter Paris.

Sigmund L. Bloom, Esq., and Robert L. Zeman, Esq., representing Robert Ray Ragazzini.

Sanford S. Finder, Esq., representing Michael J. Evans.

John F. Bell, Esq., representing Marion Joseph Serafin.

OPINION

Sweet, P. J., October 1, 1968.

On the night of June 14, 1967, a most unfortunate incident occurred by a slag dump in Chartiers Township

in this County. A respectable 15-year old girl of good family in this County and of good repute was ravished by a group of young men. The victim broke away from her tormentors toward midnight and stumbled out on to a township road where she was picked up and taken to the hospital by Chartiers Township Police, on routine patrol. Physical examination disclosed proof of recent intercourse and rough handling. It was medically contended, so far as such a thing is possible, that she had been a virgin prior to this episode.

Prompt investigation was made by the State Police and four young men were indicted for forcible rape and statutory rape. Peter Paris was tried first at the September Term, 1967 and Michael J. Evans, Marion J. Serafin and Robert R. Ragazzini were tried together at the November Term of the same year. Before the trial there was, of course, a magistrate's hearing and indictment by the Grand Jury and also petition for writs of habeas corpus and multitudinous applications for various forms of relief. These were refused and the cases proceeded to trial. All resulted in the verdict of guilty of statutory rape only.

The victim's account of the matter was that she agreed to go to a party with Michael J. Evans, a Marine private, age 18 at that time and one Gregg McElhaney, otherwise not seriously involved here. She went with these two youths in McElhaney's car out to the slag dump in Chartiers Township, a few miles away from Houston, where the contact had been made. There were a number of other youths around there in the gathering twilight a little after 9:00 that June evening and a beer party was in progress. Unfortunately, no other girls were present.

Nothing noteworthy occurred until three slightly older young men arrived on the scene. Peter Paris, Marion J. Serafin and Robert R. Ragazzini received word in a Houston saloon that a party was in progress at the slag dump. They left the tavern and proceeded to go to the beer party. When they got there, the complexion of things changed markedly. Some of the younger boys left and after a while, Paris, Serafin, Ragazzini and Evans had intercourse with the complainant. She says that this was done forcibly and against her will and accompanied by a good deal of brutality. Paris and Evans took the stand in their own defense and in separate trials each told very much the same story, i.e., they mounted the prosecutrix in the automobile but through failure of erection were unable to achieve either penetration or climax. Serafin and Ragazzini did not take the stand and by their pleas of not guilty denied the whole transaction.

In the Paris case, although the defense's testimony was denial of any sexual intercourse at all, the argument of counsel (at that stage, Michael E. Kusturiss, Esq.) was consent. The Evans' defense was conducted by Sanford S. Finder, Esq., and was likewise comprised of testimony of denial and oral argument of consent. Serafin and Ragazzini offered no evidence whatsoever. The jury returned verdicts in all 4 cases of statutory rape. The undersigned, trial judge both times, was of the opinion from the lay and medical testimony that a particularly offensive incident of forcible rape had occurred 4 times but the jury either believed that the victim did not resist sufficiently or in going to such a place in the first instance she had "asked for it". It is unfortunate the victim went to the scene of this party and stayed after she found there were

so many young men there. However, nothing untoward occurred, except the consumption of beer by minors, until the arrival on the scene of Paris, Serafin and Ragazzini*

The defendant, Ragazzini, who did not testify, defends primarily on the ground of identification. In his brief he cites: United States vs. Wade, 388 U.S. 218; Gilbert vs. California, 388 U.S. 263; People vs. Smiley, uncited; Rath vs. Maryland, U.S. . . . It is apparently Ragazzini's position that the in-court identification by the victim was legally insufficient because of the previous lineup, and that he is therefore entitled to a new trial or to release.

The Commonwealth made it very plain that they would rely on in-court identification and would not use the lineup in any way. Assuming arguendo that the lineup was defective, this would still not insulate Ragazzini from prosecution. The admission of in-court identification without first determining it was not tainted by illegal lineup, but was of independent origin, was held to be constitutional error in United States vs. Wade, supra. The Wade case held that a lineup is not a violation of privilege

---

* Peter Paris is 22 years of age, lives at 503 Bluff Street, Canonsburg, Pa. and on June 14, 1967 was 21 years of age, married and employed as a structural steel worker in Steubenville, Ohio.

Robert R. Ragazzini is 22 years of age, lives at 258 E. Pike Street, Canonsburg, Pa. and on June 14, 1967 was 21 years of age, married and employed at Kettermans, Inc., Canonsburg, Pa.

Marion Serafin is 26 years of age, lives at 713 N. Main Street, Houston, Pa. and on June 14, 1967 was 25 years of age, married and employed at Haws Refractories Co., Canonsburg, Pa.

against self incrimination. However, it goes on to hold that "Insofar as an accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him".

It should be remembered, Wade was a post indictment lineup and was at a critical stage. The lineup held here was a pre-arrest lineup before the accusatorial stage had been reached.[1] Wade, it will be remembered, did not end in an award of a new trial but only in a remand to determine whether the lineup was bad. It is pretty clear in our case that proof of Ragazzini's presence at the scene is not dependent on a lineup or its fruits.

Gilbert, supra, also held that when one is identified improperly, he is entitled only to vacation of his conviction pending the holding of such proceedings that may be appropriate to establish whether the in-court identification had an independent source.

However, we have recent additional light from the Supreme Court of the United States on the matter of lineup. In Simmons vs. United States, 19 L. Ed. 2d 1247, we learn that, "An accused's claim that in the circumstances police identification procedure was so unduly prejudicial as fatally to taint his conviction must be evalu-

---

[1] This is significant because the lineup rules are an aspect of the right to counsel (6th amendment) not of the privilege against self-incrimination (5th amendment) which applies at an earlier stage.

ated in the light of the totality of surrounding circumstances". There, a pretty unsatisfactory photograph identification preceded the in-court identification. The Supreme Court said, there was in the circumstances of this case little chance that the procedure utilized led to misidentification. ". . . the robbery was committed in the afternoon in a well-lighted bank by robbers who wore no masks and had been witnessed by five bank employees who had been able to see the robber later identified as the defendant for periods ranging up to 5 minutes. . . ." In our case, although there was a problem as to the *naming* of defendants initially, there was no problem as to *identification*. The prosecutrix was in the company of this group of young men and boys for upwards of an hour. We can take notice of the face-to-face position of parties engaged in sexual intercourse. Ragazzini was identified as being present at the scene by several witnesses not friendly to the Commonwealth.[2] It might be noted that

---

[2] There is little reason to doubt that Robert Ragazzini was present and that counsel's complaint about identification is plainly frivolous. The prosecutrix identified him in the Courtroom (81); Officer Askew said (157), that she mentioned "Raggs" in her immediate post-coital statement; Ronald Henderson said (256) that Ragazzini was there; co-defendant Evans described (283) seeing him get out of the car where the rape actually happened; Amel Whitfield said (307) that he saw Robert Ragazzini getting into the car.

Paris was tried separately. He said quite a lot about Ragazzini (219) et seq. He had been sitting with Marion Serafin and Robert Ragazzini in Betty & Birch's Tavern in Houston. After learning there was a "party" out at the slate dump: "So I—myself and Ragazzini went inside and brought Serafin and said, there's a party out at the slate dump, let's go out. Myself, Serafin, Ragazzini and Albert Martin got into my car, proceeded out

Ragazzini did not furnish an alibi notice and no person testified he was not there. He did not raise identification substantially. If we accept his position in this case, once there has been a defective lineup, the accused will always go free. What an opportunity for chicanery and collusion this can create!

In Stovall vs. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199, there was a lineup identification which did not meet today's best standards. In any event, in Stovall it was held that an unsatisfactory lineup could be admitted where the totality of circumstances required it. Mr. Justice Black, in a separate opinion to Simmons vs. United States, supra, says, "The due process question raised by Simmons is frivolous and should be deemed as such. The identifying witnesses were all present in the bank that was robbed when it was robbed and all saw the robbers". By this reasoning we should consider Ragazzini's identification defense plainly frivolous.

The *Defender Newsletter* published by the National Defender Project of the National Legal Aid and Defender Association, is hardly a source of support for convictions. Yet it describes the rule Ragazzini and Serafin seek to invoke this way:

---

the slate dump. "After arrival at the dump and a bit of beer drinking (222): "Q. Now, who was sitting in the car? A. Well, as I looked in I seen, there was Evans sitting next to her on the front seat and Ragazzini, I believe, was in the back seat. Q. All right. Then what happened? A. And then Ragazzini started to get out of the car and I got out the driver's side where I was and proceeded around the front of the car. . . ." On cross-examination (220) Paris again mentioned that he went out to the party with Ragazzini (234). He mentioned again that Ragazzini was in the back seat (238). He estimated Ragazzini's age at 21.

"The rule that a pretrial identification that is so impermissibly suggestive as to give rise to a very substantial liklihood of irreparable misidentification will be set aside, announced in Stovall vs. Denno, 383 U.S. 293 (1967), was again reviewed in Simmons . . . ."

There is no reason to believe that the lineup involving Ragazzini was impermissibly suggestive. It is obvious that there was no misidentification. Under all these circumstances, since the rule of U.S. vs. Wade, etc., it is not black and white, we should hardly set aside the conviction on this ground.

Ragazzini and Serafin make particularly vigorous objection that evidence against the defendant Evans was used against them. These defendants were jointly tried and it has been repeatedly held in both the state and federal cases that a joinder or severance is within the sound discretion of the court unless great prejudice arises.[3] Paris was tried alone. There was valid objection to trying any of the other defendants during the same term or

---

[3] Opper vs. United States, 348 U.S. 84 (1954): " 'It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled. . . . To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial.' " Quoted in United States vs. Barrow, 363 F. 2d 62 (1966).

before the same panel. We then realized that if we tried each one of the others alone, an entire year would be consumed in getting these cases through the trial stage. Accordingly, it was decided to try these three together and no prejudice was successfully shown and apparently none exists.

It is a little hard to understand this objection, except in general terms, because no confessions or admissions of Evans were used against Serafin or Ragazzini. His testimony in his own defense that Serafin and Ragazzini were present is corroborative of the testimony of other witnesses, and it is nowhere denied. Neither Serafin's counsel nor Ragazzini's cross-examined Evans, Henderson or Whitfield on this point, although they made objections. This probably reveals their position as tactical rather than sincere, although they may have misunderstood the confession rule as applying to courtroom testimony. In an attempt to ascertain if there was any merit in defendant's contention here, we placed appropriate interrogatories with the Telex Computerized Legal Center, defendants having advanced nothing but passionate generalities.

Beyond the well-known rule that the admissions of one defendant are of limited utility against another, research turned up nothing better than Commonwealth vs. Mattero, 183 Pa. Super. 548 (1957). There, it was held in the circumstances, defendants' contention, that the trial judge failed to charge the jury to limit evidence against one defendant to that defendant alone, was without merit. In the lower court opinion on the same case which is to be found at 44 Delaware County Reports 50 (1956) it says: "In the present case, true it is the defendants were not jointly indicted, being separately indicted, but the

crimes charged grew out of the same acts and much of the same evidence is necessarily applicable to all defendants."

The defendant Paris was tried first and separately. Paris, at Argument Court presented the proposition that the Court should not have allowed the amendment of the indictment to delete the words "without her consent" in one count. Very obviously, the Grand Jury had intended to charge Paris and the others with both forcible rape and statutory rape for the exigencies of proof. In an array of pretrial motions, the defendants sought to attack this double-barreled position of the Commonwealth in many ways. We felt then and still believe that it was not the intention of the Legislature to leave any gray zone between forcible rape and statutory rape. The defendant's position is that forcible rape involves resistance to the uttermost and statutory rape requires affirmative consent. We do not think the Legislature meant to create any gap between the two.[4] Here the prosecutrix testified

---

[4] Relevant portions of the Act of 1966, 19 P.S. 4721 (A) and (B) are quoted for convenient reference and because they have not been construed often, if at all: (A) "Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, is guilty of rape, a felony. . . ." (B) "Whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with her consent is guilty of statutory rape, a felony. . ."

Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and convicted of fornication.

that the intercourse was by force and against her will. The jury evidently did not believe that there was enough force used or else that her going to the slag dump with two young men and remaining there after she found there were many men and boys there was evidence of some form of "contributory negligence".

Paris now says that the amendment forced the defendant to forego evidence of bad repute on the part of the prosecutrix. The cynicism of this is apparent when one sees that the defendant Paris objected vigorously to proof of the prosecutrix virginity. It might be added that no evidence of ill repute was offered, even at side bar. Paris also claims that he didn't have time to investigate the case. The chronology of the matter is a sufficient answer. The offense happened on June 14, 1967. Paris was identified on June 19, 1967, held for Court on June 22, indicted on June *14* and called for trial in the October Term of 1967. The trial actually commenced October 9. Paris was out on bond. He had almost four months to prepare and made only conditional applications for continuance.

The defendant's own brief by its citation of In the Matter of Charles Mason Lane, 135 U.S. 443, 84 U.S. L. Ed. 219 (1890) answers his claim that it was reversible error to charge on both forcible and statutory rape at the same time.

We regret that we are required to use the names of counsel in connection with this next matter. Paris engaged Michael E. Kusturiss, Esq., a former Assistant District Attorney, to represent him. Mr. Kusturiss conducted the trial and Paris should be richly satisfied with the re-

sult. Now, however, he has engaged Allen Brunwasser, Esq., of Allegheny County to raise the defense of inconsistent representation. It seems that he alleges a conflict of interest. Mr. Kusturiss had also entered an appearance for Marion Serafin. When the matter came on for trial, however, Attorney John Bell of Washington, Pennsylvania, represented Mr. Serafin. When we came to Argument Court, both Mr. Brunwasser and Mr. Kusturiss' assistant, Mr. Liekar, presented briefs and argument. Mr. Kusturiss still, we are told, represents Paris generally and Mr. Brunwasser represents him for the purpose of demonstrating Mr. Kusturiss' inadequacy. We do not find him inadequate.

There are a number of reasons why Mr. Brunwasser's position for Paris is unsound. First, most of the dual representation cases involve the lawyer who tries to defend two felons being brought to trial together. Here, Mr. Kusturiss defended only one of them—Paris. Secondly, if Mr. Kusturiss had sought to call Serafin at Paris' trial, Serafin, yet untried, would certainly have had the right to claim and would have claimed his privilege which we would have sustained. It has been repeatedly held. "When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. . . . A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel. . . ." U.S. ex rel. Darcy vs. Handy, 203 F. 2d 407 (3rd Cir. 1953), cert. denied, 346 U.S. 865 (1953). The following, from the brief of the special attorney for the Commonwealth

is happily put and well said: "Of interest is the fact that Paris, in making his complaint about dual representation never disavows his trial counsel. In his motion to strike conviction he concludes the motion by indicating satisfaction with Attorney Kusturiss if he would drop Serafin before a new trial. In his brief, he states that (page 8 of special brief) 'other alleged trial errors will be handled by trial counsel or his representative.' Obviously, Paris does not actually feel that Mr. Kusturiss' representation of Serafin caused him any harm." This is unlike either Commonwealth vs. Meehan, 198 Pa. Super. 588 (1962) reversed 409 Pa. 616 (1963) or Com. ex rel. Whitling, 406 Pa. 45 (1962) where there *was* conflict of interest between defendants. This is no conflict of interest between Paris and Serafin and while harm need not be shown to arise from it, the actual presence of a conflict of interest, not merely a possibility of conflict, must be shown. A fortiori, private counsel may represent non-adverse co-defendants and to permit this where there is no objection is not unfair.[5]

The defendant, Ragazzini, also raises as one of his principal errors the following question.

"Was it error for the Court to impair defendant's counsel with a statement that defendant's counsel's actions might cause the defendant to be placed

---

[5] In order to be sure that we are not swimming against the current here, a careful check of secondary legal sources was made. See Effective Assistance of Counsel, 49 Va. L. Rev. 1531 (1963); Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Northwestern U. L. Rev. 289 (1964); Effective Assistance of Counsel for the Indigent Defendant, 78 Harvard L. Rev. 1434 (1965).

in jail without bond to await trial at the next regular term of Court and then refuse defendant's counsel's motion to withdraw as trial counsel from the case under the above-mentioned circumstances?"

In his brief it is argued that counsel was placed in an unfavorable position before the jury ". . . . that he would be severely hindered in properly representing the defendant at trial if forced to continue . . . . and thereby made it impossible for defense counsel Bloom to render complete and effective representation to the defendant Ragazzini. . . ." This requires some discussion of the technique of judge-baiting. A Yale law professor has recently been quoted as saying, "The courtroom is a splendid place where defense counsel may strut and the State's attorney alink. . . ." With this we are unable to agree.

A remark by the Court is cited as intimidation of defense counsel.

> "Now, look, I don't intend for this trial to become a zoo, and if I have to withdraw a juror we're going to forfeit some bonds or at least call them in and confine people until the next term of Court. I don't intend to let this trial become a zoo. All right, go ahead, ..."

An examination of the record shows that we began the case the morning of December 11, 1967. Haggling in chambers lasted until 2:52 p.m. Motions were then made for some pages. On page 7, for instance, Mr. Finder sought to disqualify the trial judge on the ground that he had presided over the Paris case. On page 11, Mr. Bell said, "We would like to make or renew all the motions we made in the Paris trial." On page 15, Mr.

Bloom objected to starting with the panel as there were only 38 left and this would force us to talesmen. Mr. Finder, on page 20, objected to arranging an advance for talesmen until we had exhausted the panel, but stated he had not had time to look over the panel. We spent all day December 11th struggling with this sort of thing. On the morning of the 12th we went on. Finally, at 10:03 a.m., December 13, 1967, after 2 full days in which each of the three defendants was allowed his full measure of challenges instead of being compelled to share them, as authorized by law, we were ready to start. As soon as the Assistant District Attorney was on his feet to open, Mr. Bloom had more objections.

On page 41 the following occurred. Mr. Bloom said,

> "I do not feel I could try a case under the severe pressure, that if I make an action which the Court would feel would make this case into a circus that my defendant would suffer as a result of that and if that is the Court's feeling, then I would respectfully request to withdraw at this time."

After Mr. Bloom's motion the Court said, "Anybody else got any motions?" Mr. Finder said, "Let me simply say I felt the remark was uncalled for. . . ." There were several more pages of motions. At 10:48 a.m. we got underway. The trial judge does not now recall whether the remark about not letting this trial become a zoo was made at sidebar or not, but earlier he had said, "I don't want to spend my day in fruitless conferences here, now, at sidebar. I think I've had all the conceivable motions that can be made, but if you've got another one, make

it," and on the same page the zoo business begins. If, as is suspected, this was made out of the hearing of the jury, the briefs, the oral arguments and opinion hereon are irrelevant.

There is a growing feeling in the criminal defense bar that "anything goes". Lawyers who are polite, even charming, dignified, respectful and courteous during the trial of civil cases or equity matters put on another mask when they come into the Oyer and Terminer sessions. In sincere motions proliferate while the search for truth is lost in the struggle for partisan advantage. Since we have been in an era of rapid change in the criminal law, more pronounced in its adjective than substantive aspects, some of the most unorthodox approaches demand and receive serious consideration.[6] Certain trial lawyers, who frequently represent seriously guilty criminal defendants, have read into these decisions what they seek to find there.

As I understand the tradition of Anglo-American justice, the judge is not a mere umpire consigned to the trivial role allotted the Bench in the Perry Mason series, i.e., occasionally intervening in a pathetic way to say "Order in the Court". He is to be in charge of, and on top of the proceedings at all times. He should be equally alert to protect the rights of the accused and the victim. Much has been written and much has been said in recent years about the disparities of resource between the prosecution and the defense. How untrue that was as this

---

[6] Not too long ago we had a case here where the printing of football pool tickets was seriously defended by a leading member of the Bar as freedom of the press. See: Commonwealth vs. Lane, 46 Wash. Co. 147 (1966).

drama unfolded in the courtroom. A young, teenage girl sobbing out the story of her repeated violation, a youthful Assistant District Attorney trying his first important case, were almost inconspicuous in the corner while the defense side of the room reflected the self-assured confidence of these boastful victors in the sexual encounter.

There are arguments in the briefs and at the Bar that the Court made unspecified prejudicial remarks which had "a horrendous" effect, and that "nuances of tone" and "a shambles" in reading the Court's charge hurt one or more defendants. These vague complaints scarcely deserve mention.[7] They are less than accurate.

Actually, the defendants were fortunate in the result after the defense presented—two claimed they climbed onto the victim, but could not get erections and the other two didn't even present any factual defense at all.

It is important that we maintain even-handed justice at all times. It is also important that we maintain the moral standards of the community, and uphold the law and recognized decencies of practice.

---

[7] The summer 1968 issue of *American Criminal Law Quarterly* at p. 175 deals with the question of silent communication between judge and jury. The article is filled with counsels of perfection on the "facial expression and gestures of the trial judge." In conclusion, after some pages of discussion of frowns, smiles, gestures, etc., it indicates that there are few, if any precedents for reversal in the field. Mr. Conner's article would seem to indicate that while obviously one should be impartial in manner as well as in fact, there is little legal basis for the objections before us. See: *The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice.*

The real questions here today are: (1) were all the defendants guilty of the offenses found by the jury; and (2) did they receive a fair trial? To each we say "yes."

(s) Charles G. Sweet,
P. J.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 25, April Term, 1969

COMMONWEALTH OF PENNSYLVANIA

vs.

PETER PARIS,

Appellant

Appeal from the Order of the Court of Quarter Sessions of Washington County at No. 229, September Sessions, 1967.

Per Curiam, Filed: March 12, 1970:

Order affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA

No. 3257A Miscellaneous Docket

COMMONWEALTH OF PENNSYLVANIA

vs.

PETER PARIS,

Appellant

May 26, 1970 denied.

By the Court.

LIBRARY
PREME COURT, U. S.

FILED
JUN 18 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

1970

No. [redacted]
276

PETER PARIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

ALLEN N. BRUNWASSER,
Attorney for Petitioner.

903B Grant Building,
Pittsburgh, Pa. 15219

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

Petition 1

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 3

Constitutional Provisions, Statutes, Rules of Procedure and Regulations Involved 5

History of the Case 10

Reasons for Granting the Writ 14

Conclusion 55

TABLE OF CITATIONS

CASES:

Appeal of Gault, 1967, 87 S. Ct. 1428, 1446, 387 U.S. 1, 33 ..... 39, 48

Bailey v. Ala., 1910, 219 U.S. 219 54

Barber v. Page, 1968, 80 S. Ct. 1318, 1321, footnote 1, 390 U.S. 719, 722, fn. 1 ..... 3, 29

Bollenback v. U. S., 1946, 326 U.S. 607 40

Bowles v. Pechersky, W.D. Pa., 64 Fed. Supp. 641 .. 54

Campbell v. U. S., 1960, 365 U.S. 85 ..... 53, 54

Carrington v. Rash, 1965, 380 U.S. 89, 85 St. Ct. 775 54

Cole v. Arkansas, 333 U.S. 196 (1947) 44

Commonwealth Coatings Corp. v. Continental Casualty Co., 1968, 89 S. Ct. 337, 393 U.S. 8 53

Com. v. Ashmore, 1956, 8 D. & C. 523 43
Com. v. Berkenbush, 1920. 267 Pa. 455 40
Com. v. Bowes, 1955, 166 Pa. Superior Ct. 625 41
Com. v. Buzak et al., 1962. 197 Pa. Superior Ct. 514, 518, 179 A. 2d 248 37
Com. v. Carpenter, 1953. 172 Pa. Superior Ct. 271 .. 43
Com. v. Cohen et al., 1964, 199 A. 2d 139, 145, 203 Pa. Superior Ct. 34 45
Com. v. Crow, 1931, 303 Pa. 91 27
Com. v. Cox, 1967, 209 Pa. Superior Ct. 228 A. 2d 30 36, 37, 43, 45, 49, 54
Com. v. Didio, 212 Pa. Superior Ct. 51, 58, 239 A. 2d 883 35
Com. ex rel. Esterline v. Esterline, 1956. 181 Pa. Superior Ct. 532, 539, 124 A. 2d 133, 137 26
Com. v. Exler, 1914, 243 Pa. 155, 159, 161 41
Com. v. Exler. 1915. 61 Pa. Superior Ct. 423 41
Com. v. Farrell, 1935. 319 Pa. 441, 443. 19 P.S. 631 27
Com. v. Francis. 1963, 191 A. 2d 884, 889, 201 Pa. Superior Ct. 313 27
Com. v. Fusci. 1935. 117 Pa. Superior Ct. 379, 384 .. 27
Com. v. Garvbush. 1948. 12 Favette 47 36
Com. v. Hallberg. 1953, 374 Pa. 554 44
Com. v. James, 1968, 240 A. 2d 368, 369, 429 Pa. 250 28
Com. v. Kline, 1949. 361 Pa. 434 50
Com. v. Lipschutz. 89 Pa. Superior Ct. 142 50
Com. ex rel. Lucas v. Russell, 243 A. 2d 184, 212 Pa. Superior Ct. 478 ..... 30, 31
Com. v. Meehan, 1963, 187 A. 2d 579. 409 Pa. 616 ... 28
Com. v. Miller. 1965, 208 A. 2d 867, 205 Pa. Superior Ct. 297 27
Com. v. Moon, 1955, 383 Pa. 18, 29, 117 A. 2d 96 ... 37
Com. v. Nadolny, 1949, 163 Pa. Superior Ct. 517 42
Com. v. Resinger, 1968, 248 A. 2d 55, 432 Pa. 398 ... 30

Com. v. Robertson, 1967, 234 A. 2d 61, 62, 211 Pa. Superior Ct. 79 30
Com. v. Samyan, 1933, 21 D. & C. 401 36
Com. v. Scoleri, 1968, 245 A. 2d 295, 432 Pa. 571 ... 50
Com. v. Shrodes, 1946, 354 Pa. 70 42
Com. v. Small, 434 Pa. 497, 254 A. 2d 509 30
Com. v. Towbar, 152 A. 2d 917, 919, 190 Pa. Superior Ct. 93 35
Com. v. Williams, 1968, 248 A. 2d 301, 432 Pa. 557 ...50, 51
Com. v. Wink, 1951, 170 Pa. Superior Ct. 96 41
Com. v. Wilson, 1968, 240 A. 2d 498, 501, 429 Pa. 458 30
Com. v. Wright, 1964, 415 Pa. 55, 202 A. 2d 79 50
Elliott v. Miller, 214 A. 2d 351, 206 Pa. Superior Ct. 536 (1965) 13
Garner v. La., 368 U.S. 157 39
Garrity v. N. J., 1967, 87 S. Ct. 616, 619, 385 U.S. 511 38
Gideon v. Wainwright, 1963, 372 U.S. 335 .....32, 33
Glasser v. U. S., 1941, 315 U.S. 60, 70-72, 75 ..... 3, 30, 33, 55
Griffin v. Cal., 1965, 380 U.S. 612, 614, 85 S. Ct. 1229, 1232 .....18, 27, 35
Iacovino v. Caterina et al., 336 Pa. 308, 310 13
Interstate Circuit, Inc. v. U. S., 306 U.S. 208, 226 ... 18
Maxwell v. Bishop, 398 F. 2d 138 39
Michelson v. U. S., 335 U.S. 469 51
Morrison v. Cal., 1933, 291 U.S. 82 .....54, 55
Spencer v. Texas, 87 S. Ct. 648, 385 U.S. 554 47
Spevak v. Cal., 380 U.S. 609, 85 S. Ct. 1229 38
Stevick v. Com., 1875, 78 Pa. 460 .....38, 39
Stirone v. U. S., 361 U.S. 212 45
U. S. ex rel. Darcy v. Handy, 3 Cir., 1953, 203 F. 2d 407 .....32, 33
U. S. v. Di Re, 333 U.S. 581 18
U. S. v. Green, 1957, 355 U.S. 184 38

U. S. v. Jackson, 1968, 88 S. Ct. 1209, 1211, 1216, 390 U.S. 570 38
U. S. v. Kessler, 3 Cir., 213 F. 2d 53 47
U. S. v. Pereria, 314 U.S. 1, 11 40
U. S. v. Price, 1966, 86 S. Ct. 1152, 1158, 383 U.S. 787 40
U. S. v. Smtih, 1956, 3 Cir., 232 F. 2d 570 40
U. S. v. Roack, 1963, 3 Cir., 321 F. 2d 1 44
U. S. v. Russell, 369 U.S. 749 .....44, 45
Vitarelli v. Seaton, 359 U.S. 535 (1958) 54

ACTS:

Act of May 19, 1887, P. L. 128, §1 41
Act of June 24, 1939 (P. L. 872) 6
Section 721 7
Section 722 ..... 7, 8
Act of May 12, 1966 (18 PS 4721, Pocketparts) 42

MISCELLANEOUS:

Constitution of the United States, Sixth and Fourteenth Amendments 3, 4, 5, 6, 14, 33, 35, 39, 40
78 Harvard Law Review 1434 33
In re Lane, 135 U.S. 443 37
N.L.R.B. v. Industrial Union of Marine Ship Building Workers of America, etc. (1958), 88 S. Ct. 1717, 391 U.S. 418 38
59 Northwestern Law Review 289 (1965) 34
Penna. Constitution, Article 3, §6, plus 46 PS 581 ...44, 45
Pa. R.C.P. 205 .....29, 40
49 Virginia Law Review 1531 33

IN THE SUPREME COURT OF THE UNITED STATES

No.

COMMONWEALTH OF PENNSYLVANIA

vs.

PETER PARIS,

Petitioner

PETTTION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Peter Paris prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

The Opinion of the Court of Quarter Sessions of Washington County, Pennsylvania (A.)* is reported at 49 Washington County Reporter 42. The Opinion of the Superior Court of Pennsylvania (A.) is reported in 264 A. 2d 170, 216 Pa. Superior Ct. 803. The Supreme Court of Pennsylvania denied appeal. The Order is unreported.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under authority of 28 U.S.C. 1257 (3).

The date of the decree sought to be reviewed was March 12, 1970. A Petition for Appeal was filed in the Supreme Court of Pennsylvania on March 30, 1970 at No. 3257A Miscellaneous and denied per curiam without opinion on May 1, 1970.

*"A" refers to the Appendix filed with the Petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. When the same attorneys represent three felony defendants who could be vital and material eyewitnesses for each other, is the failure of said counsel to use, call or make available their two other clients or the information received from them at appellant's trial reversible dual representation within the meaning of the Sixth and Fourteenth Amendments to the Constitution of the United States as interpreted by *Glasser v. U. S.*, 1941, 315 U.S. 60, 70-72, 75 and *Barber v. Page,* 1968, 390 U.S. 719, 722, footnote 1, 90 S. Ct. 1318, 1321, footnote 1?

2. Do the 5th, 6th and 14th Amendments to the Constitution of the United States prevent a trial judge from advising a jury that assertion of defendant's constitutional rights gives him an advantage?

3. Does defendant's privilege against self-incrimination as defined by the 5th and 14th Amendments to the Constitution of the United States bar trying him before the same jury for both forcible and statutory rape because he must testify to the victim's consent to defend against forcible rape and is thus coerced to present personal evidence sufficient to convict himself of statutory rape?

4. Do the 6th and 14th Amendments to the Constitution of the United States permit court instruction on aiding and abetting when defendant is indicted and tried separately as a principal?

5. May a defendant bound over to and indicted by the grand jury for forcible common law rape be convicted

for statutory rape within the meaning of the 6th and 14th Amendments to the Constitution of the United States?

6. Is a judge who discusses any aspect of defendant's case ex-parte with the prosecuting attorney disqualified as trial judge under the 5th, 6th and 14th Amendments to the Constitution of the United States when he refuses to state what occurred and places the burden to show prejudice upon defense counsel who was not there?

7. When alleged sodomy committed by a defendant standing trial for rape is admitted as part of the events surrounding this alleged crime, do the 5th, 6th and 14th Amendments to the Constitution of the United States require that the trial judge, even without request, instruct the jury why this evidence has been admitted and that defendant is not being tried for sodomy?

8. Does placing upon defendant the burden of establishing the bad community repute of the statutory rape victim create an unconstitutional conclusive presumption which is impossible for him to overcome?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES OF PROCEDURE AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his

favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LAWS OF PENNSYLVANIA

1966 SPECIAL SESSION NO. 3

No. 1

AN ACT **

SB 3

Amending the Act of June 24, 1939 (P. L. 872), entitled "An act to consolidate, amend and revise the penal laws of the Commonwealth," changing the penalty for the crime of rape and assault with intent to ravish.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

** The words in brackets are deleted from the old legislation.

Constitutional Provisions, Statutes, Rules and Regulations Involved

Section 1. Sections 721 and 722, act of June 24, 1939 (P. L. 872), known as "The Penal Code," are amended to read:

Section 721. Rape; *(a)*.—Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, [or whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with or without her consent,] is guilty of rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding [seven thousand dollars ($7,000), or] *ten thousand dollars ($10,000),* and undergo imprisonment, by separate or solitary confinement at labor [or by simple imprisonment, not exceeding fifteen (15) years, or both.] *for a term the length of which shall be determined by the court but shall not be less than fifteen (15) years or more than life if in the course of the commission of the act, he inflicts serious bodily injury upon anyone. In all other cases he shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000); or undergo imprisonment by separate or solitary confinement at labor or by simple imprisonment for a term which shall be determined by the court, the maximum of which shall not exceed twenty (20) years, or both.*

As used in this section the term "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any member or organ of the body.

(b) Whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses

any woman child under the age of sixteen (16) years with her consent, is guilty of statutory rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years or both.

Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication.

Section 722. Assault With Intent To Ravish.—Whoever commits an assault and battery upon a female, with intent, forcibly and against her will, to have unlawful carnal knowledge of her, is guilty of a felony, and on conviction, *for the first offense,* shall be sentenced to pay a fine not exceeding [two thousand dollars ($2,000) or] *seven thousand dollars ($7,000) and* undergo imprisonment, by separate or solitary confinement at labor, not exceeding [five (5)] *fifteen (15)* years [or both] *if in the course of the commission of the act, he inflicts serious bodily injury upon anyone. In all other cases he shall be sentenced to pay a fine not exceeding twenty-five hundred dollars ($2,500), or undergo imprisonment by separate or solitary confinement at labor or by simple imprisonment for not more than seven (7) years or both. For the second offense, or any subsequent offense, he shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,-000) and undergo imprisonment by separate or solitary*

confinement at labor for a term up to a maximum of his natural life.

As used in this section the term "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any member or organ of the body.

Section 2. This act shall take effect immediately.

Approved—The 12th day of May, A.D. 1966.

William W. Scranton

HISTORY OF THE CASE

This appeal involves an acquittal of forcible rape and a conviction of consentual statutory rape on a forcible statutory rape indictment (18 PS 4721) after a trial in Washington County before President Judge Charles G. Sweet and a jury.

On the night of June 14, 1967, fifteen and one-half year old (27a)*** Debra Lynn Snarey met Michael J. Evans (Evans) and Gregg McElhaney (McElhaney) for the first time (32a) in front of a soda fountain (29a, 35a). Evans invited her to a beer party (32a, 33a) and she accepted (36a-37a).

The three then drove in McElhaney's car to a deserted slag dump (38a, 181a) and began drinking. Additional cars and men arrived (39a-40a).[1] Among them were Peter Paris (the present appellant) and Marion Serafin (40a).

Within a short time, many of the males had sexual intercourse with the victim who then left and complained to the police (56a, 164a).[2]

*** "a" refers to the printed record in the state court.

[1] "It seemed like hundreds, but there weren't that many." (40a)

[2] "Saying she has been raped by a gang of boys, white and colored boys." (164a)

The eight defendants who were not subject to Juvenile Court jurisdiction were charged before Alderman James Dalessandro with forcible rape.[3]

At the preliminary hearing conducted by this issuing authority, Paris and Serafin were represented by M. E. Kusturiss, Esquire (Kusturiss) and Michael Joseph Evans by John F. Bell, Esquire (Bell).

These three plus Robert Ray Ragazzini were held for Court. The other boys were discharged.

On September 7, 1967, the grand jury indicted Paris and Ragazzini separately but Evans and Serafin jointly for both common-law and forcible statutory rape as these crimes were defined previous to the May 12, 1966 Amendment (p. 6).

The Paris trial, in which he was represented by Bell and Kusturiss, began October 9, 1967 and terminated October 13, 1967 with a verdict finding him guilty of statutory rape only (323a). Another jury subsequently acquitted of common-law but convicted all other defendants of statutory rape (Opinion, 343a). All defendants filed timely post-conviction motions which the Court listed for March 18, 1968 disposition.

The Federal questions raised in this Petition for Certiorari were presented in the trial court and preserved on

---

[3] "Peter Paris 'being then and there over the age of 16 years and upwards, did unlawfully, willfully and feloniously carnally know and abuse one, Debra Lynn Snarey, being then and there a woman child under the age of sixteen years, to wit 15 years, with (or without) her consent, forcibly and against her will.' Violation—Section 721, Act of 1931—rape." (p. 6)

appeal to the Superior Court of Pennsylvania and the Petition for Appeal to the Supreme Court of Pennsylvania.

On January 26, 1968, Allen N. Brunwasser (Brunwasser) mailed a motion to strike the conviction (because of dual and prejudicial representation) to the Court (331a) who, on January 31, 1968, ordered the District Attorney to file such reply as would be deemed appropriate and listed the matter for argument with the other pending motions (338a).

The issue was preserved by appeal to the Superior Court of Pennsylvania and the Petition for Appeal to the Supreme Court of Pennsylvania.

Meanwhile, District Attorney Harold V. Fergus had been elevated to the Washington County Common Pleas Bench and Jess B. Costa sworn on January 1, 1968 to replace him.

Mr. Costa, on February 5, 1968, requested special counsel be appointed because Bell had joined his staff as an assistant District Attorney. His Petition (335a) will acquaint this Court with the counsel conflict problem which existed prior to its presentation.

Arnold W. Hirsch, who had been First Assistant under District Attorney Fergus and chief trial counsel in the Paris case, was designated to process the post-conviction proceedings and, on June 22, 1968, filed an answer to the Paris Motion To Strike (339a). Briefs were presented and argument concluded before Sweet, McCune and Curran, JJ.

The trial judge, on October 1, 1968 and in one opinion, signed only by himself,[4] denied pending motions for a new trial and in arrest of judgment and the motion to strike without ordering an evidentiary hearing.

With the exception of the situation involving dual representation of counsel, the questions raised in this Petition for Certiorari were first raised in the trial court and preserved on appeal to the Superior Court and Petition for Appeal to the Supreme Court of Pennsylvania. The method by which they were raised is included in the questions themselves and will not be specifically detailed here because this would result in duplicity.

On October 11, 1968, Paris was sentenced to a term of two and one-half to six years imprisonment from which punishment he appealed to the Superior Court of Pennsylvania and then to the Supreme Court of Pennsylvania without success.

---

[4] This was improper. "Motions for new trials are required by law to be heard by the Court en banc; and it is the duty of all the sitting judges not only to hear the motion, but subsequently to meet together, and discuss and determine the matters presented to them:" "The failure to conform to this practice constitutes reversible error:" *Iacovino v. Caterino et al.*, 336 Pa. 308, 310; *Elliott v. Miller*, 214 A. 2d 351, 206 Pa. Superior Ct. 536 (1965).

REASONS FOR GRANTING THE WRIT

The 6th and 14th Amendments prohibit the same attorney from representing three criminal defendants charged with the same crime because

(a) they cannot be called as witnesses for each other without losing individual tactical advantage plus the protection of the privilege against self-incrimination and

(b) facts obtained from one cannot be used by counsel in the defense of the others without violating the confidential relationship between attorney and client.

The jury was confronted with four problems in its evaluation of the trial evidence: (1) the victim's invitation to take on the entire crowd; (2) the pre-rape events; (3) the rape and sodomy; (4) whether Paris was an aider and abettor to any other not yet on trial participant.

---

(1) The Victim's Invitation To Take on the Entire Crowd

Direct examination by the prosecutor discloses that Paris met the victim while she was sitting with Evans at which time she made offer to have intercourse with everyone present (233a-234a).

> "Q. When was the next time you saw Debbie?
>
> A. Well, walking around and I was walking past Patterson's car and I heard voices inside and I looked in and she was sitting there.

Q. Now, who was sitting in the car?

A. Well, as I looked in I seen, *there was Evans* sitting next to her on the front seat and Ragazzini, I believe, was in the back seat.

Q. All right. And what was she doing when you got inside the car?

A. When I got inside the car?

Q. Yes.

A. Well, I walked around the back of the car and to the other side by the driver's side and as I sat down in the car, she was talking and as I sat down there, I heard her say she was saying to the guys on the other side of the car, I imagine, because she was sitting on the edge of the seat, I heard her say that 'One minute apiece, because I want to be home by 10:30' and then I also heard her say that 'are you going to use rubbers or are you going to pull it out before it happens?' Them guys on the outside of the car yelled, 'Oh, we're going to pull it out.' " (233a-234a) (Emphasis supplied.)

Paris then says he walked around the front of the car and subsequently saw the victim lying alone on the front seat with her legs spread apart (234a-235a). He attempted intercourse (236a) but was unsuccessful because of failure to obtain an erection. He denies any touching of the victim.

"Q. Did you at any time lay your hands on any part of her body as you got in the car?

A. No, sir.

Q. Did your penis at any time touch her body?

A. No, sir." (236a)

Paris denies he ever returned to the car again:

"Q. Did you go back into the car again?

A. No, sir." (237a).

"Q. Mr. Paris, did you at any time have sexual intercourse with Debbie Snarey that night?

A. No, sir.

Q. Did you at any time abuse her physically in any manner?

A. No, sir.

Q. Did any of your body come in oral contact with Debbie . . . let me rephrase that question. Did she at any time handle or come orally in contact with your penis?" (239a-240a)

"A. No, sir.

Q. Did you at any time try to force her to take your penis orally?

A. No, sir." (240a)

On cross-examination, the jury is advised that Mike Evans was a witness (242a):

"Q. Well, *Mike Evans was there, wasn't he?*

A. Yes, sir." (Emphasis supplied.)

It is respectfully suggested that it was error for the trial court to overrule defense counsel's objection (255a) that his re-examination of defendant (which here follows) "leaves the impression that the Court didn't believe his testimony." It also re-emphasizes Evans's presence just before the action began.

"Q. You were at the driver's seat, *Evans was in the middle* and she was on the passenger side?

A. Yes, sir.

Q. You got out of the car and went around the back of the car . . .

A. No, sir, front of the car.

Q. And went around the front of the car and got on the other side. By the time you got over there, Miss Snarey was on her back with one leg up over the seat and one foot or leg down to the side and talking about 'one at a time', and rubbers and things of that sort?

A. No, sir. She said this when I first got in the car to sit down. As I sat down, she was saying, "I'll give younse—' she was talking to the guys that was standing on the other side of the car, she said that I'll give younse one minute apiece, 'cause I want to be home by 10:30.'

Q. *To whom did she make these remarks* about giving them one minute apiece?

A. Well, I imagine to the guys that was standing outside the car *and to Evans.*" (253a-254a) (Emphasis supplied.)

Evans was a necessary witness as to this phase of the case. Although the jury did not find defendant guilty of forcible rape, the credibility of the victim as to whether intercourse, natural or oral, took place was vital to the defense.

---

(2) The Pre-Rape Events

Paris arrived with Serafin, Raggazini and Albert Martin (40a, 240a). Martin was never seen again (241a).

Cross-examination of Paris brings out clearly to the jury the friendship of these parties (247a).

"Q. Now, isn't it true that the only real buddies you had there that evening were Raggazini and Serafin?

A. Well, they were my buddies, yes."

"Q. And do you also deny that while you were having, attempting intercourse, Serafin was holding her down?

A. I deny that. I didn't—it never happened." (250a)

Serafin's failure to corroborate his pal could not escape the jury which naturally would draw the fatal inference that his testimony would harm rather than help his friend. *Interstate Circuit, Inc. v. U. S.*, 306 U.S. 208, 226; *U. S. v. DiRe*, 333 U.S. 581, 593; *Griffin v. Cal.*, 1965, 380 U.S. 612, 614, 85 S. Ct. 1229, 1232.

The victim was not certain whether Paris or Serafin were alone or together guilty of pre-rape impropriety. The following testimony will point out the indecisiveness of this witness and show how necessary it was that at least Serafin appear and explain his part in the situation and exonerate defendant if he could.

"Pete Paris and Marion Serafin arrived and came over to her together" (40a); Serafin backed her up against the car (42a); they were getting rude (43a); Paris put his hand over her mouth and was squeezing her neck (44a); said he would break her neck if she didn't stop screaming; they continued to get fresh (44a, 45a); they got on either side of her in the car (47a, 48a).

The victim recollects (48a):

"Q. Now, you say the one had you down. Who had you down?

A. I don't remember whether it was Paris or Serafin.

* * * * * * * *

A. Well, they had their hands over my mouth so I couldn't scream, and then the one put his hand up my dress.

Q. Which one was it?

A. I don't remember whether it was Paris or Serafin."

She additionally testifies (49a) that one of the boys put his hand into her vagina and told her that if she tried to scream he would abuse her and subsequently advised he wanted to have intercourse and when she said "no", pushed her down.

"Q. Do you know which one it was that pushed you down?

A. Paris or Serafin." (50a)

When she discusses her legs being grabbed, being pu ed down and frightened, she is consistent in her inability to identify the actor.

"Q. When you say 'one of them', who do you mean?

A. I don't know whether it was Paris or Serafin.

Q. Was it one of the two of them?

A. Yes." (50a-51a)

---

(3) The Rape and Sodomy

It is apparent that both Serafin and Evans are knowledgable on-the-scene eyewitnesses to the alleged rape and

sodomy. The following testimony makes this clear as the victim tells what happened subsequent to the pre-rape abuse:

"Q. What happened after that?

A. Well, then, he got in the car.

Q. Who got in the car?

A. Paris.

Q. And what did he do?

A. Got on top of me.

Q. What did he do when he got on top of you?

A. Tried to have—started to have intercourse.

Q. How about his clothes? What, if anything, did he do with them?

A. Well, I had my eyes closed and I didn't look.

Q. Did you stop screaming by then?

A. Yes, I was crying then.

Q. You were what?

A. Crying.

Q. Were you consenting to this intercourse he was trying to have?

A. No.

Q. Had you ever had intercourse prior to this?

A. No.

Q. While this was going on, where was *Serafin*?

A. He was out of the car and then Paris said he—said that he couldn't get a hard on and he got up towards the steering wheel where my head was and Paris—*Serafin* came in the car.

Q. Now, when Paris was originally on top of you attempting to have intercourse, did you feel any pain?" (51a-52a)

"A. Yes.

Q. What area of your body was it?

A. In the vaginal, down there.

Q. And you say he went up toward the top of you. What did he do then?

* * * * * * * *

A. He told me to put—to open my mouth and to—

Mr. Hirsch:

Q. What did he do to you?

A. He stuck his penis in my mouth.

Q. And was it Paris that did that?

A. Yes.

Q. Did you resist that?

A. Yes." (52a-53a)

"Q. Was he able to do it?

A. Yes.

Q. *And while he was doing this, what was Serafin doing?*

A. *He was having intercourse.**

Q. And at that time were you feeling anything in the area of your vagina?

A. Yes.

Q. After that what happened?

A. *Then Paris went on top of me and* Serafin came up towards my face and made me do the same thing.*

Q. Why didn't you scream or cry out while this was going on?

A. I couldn't.

Q. Why couldn't you?

---

* The court is asked to take judicial notice that this would be impossible in the front seat of the car.

A. Because his penis was in my mouth.

Q. Were you still afraid as you had been before?

A. Yes.

Q. And what were you afraid of?

A. Dying and what they were doing to me.

Q. All right. Now Paris—on the second occasion, did Paris have intercourse with you?

A. Yes.

Q. And did he penetrate into your vagina?

A. Yes." (53a-54a)

"Q. And what happened after that?

A. *And then they got out and Mike Evans got in.*

Q. Now, Evans is the one whom you originally talked to?

A. Yes.

Q. What did he do?

A. He got on top of me and was having intercourse and he was getting real mad 'cause he said he couldn't get it in and he took my legs and kept on pulling them apart, and he was yelling at me and biting my neck.

Q. *Where was Paris at this time?*

A. *Outside the car.*" (54a) (Emphasis supplied.)

It is interesting to note that neither doctor called by the victim found any evidence of these bites (111a, 141a-142a).

State Trooper Herbert L. Stouffer advises that he investigated the case (167a-168a) and that seven juvenile and eight adult arrests were made (169a). He names them all (168a-169a) and states the seven juvenile cases are still pending but that four adults were discharged at

the office of the Alderman after a hearing (170a). This concludes the State's case (173a).

Defense counsel at side bar both claim surprise that the Commonwealth rested without presenting Serafin, Raggazini and Evans whom it had subpoenaed and asks time to interview these and other witnesses before presenting his side of the case (173a-174a):

> "Mr. Kusturiss: This comes rather as a surprise, Your Honor. I would at this time request of the District Attorney to give me the names and addresses of all witnesses they had subpoenaed to appear here on behalf of the Commonwealth and didn't notify them to appear here today and to give me time to talk to these witnesses. I have stayed away from them and I don't know what their testimony will be.
>
> By the Court: Are there witnesses that you have subpoenaed for the exigency of proof that you have not now called?
>
> Mr. Hirsch: *We subpoenaed the three defendants in the other cases.*
>
> By the Court: *That would be Serafin, Ragazzini and Evans.*
>
> Mr. Hirsch: We subpoenaed 2 more named Patterson, we subpoenaed a young boy named Whitfield.
>
> Mr. Bell: Is he here right now?
>
> Mr. Hirsch: He's been around all day." (Emphasis supplied.)

The side-bar conference ends and the Court advises the jury (176a-177a):

> "Defendant's attorney didn't expect the Commonwealth to rest at this point. He wasn't figuring on

starting today. He has to make an opening argument to start with; *he also indicates he wants to talk to certain witnesses that he thought the Commonwealth was going to call and didn't.* Accordingly, I've agreed to his request that we let you stay over until tomorrow morning for him to start at 9:30 tomorrow morning. Accordingly, we are going to adjourn here in a moment." (Emphasis supplied.)

However, only Gregg McElhaney (178a), Ronald Henderson (203a), Harry Lukich (256a) and Amel Whitfield (261a) are called. McElhaney's case is still pending in the Juvenile Court (169a, 170a, 172a). Ronald Henderson was discharged by Alderman Dalessandro as was Harry Lukich (170a). Whitfield was never prosecuted.

McElhaney indicated that he talked to Kusturiss for the first time the previous night (201a) and that Debbie was advised they were going directly to the slag dump (181a, 193a). Henderson (216a) says that he talked to both Kusturiss and his investigators. Whitfield (261a) advises that he was subpoenaed by the District Attorney and talked to Kusturiss for the first time the day before (262a, 275a). Lukich tells us nothing about when the first contact with defense counsel was made. He does say that he was represented by Mr. DiSalle who, incidentally, is now first Assistant District Attorney under Mr. Costa. (See unprinted letter enclosed with Petition requesting special counsel be appointed.)

It was apparent to everyone on the jury that defense counsel must have talked to all knowledgeable witnesses but did not call Evans and Serafin. Therefore they must have made the permissive inference that the testimony of these people would not back Paris up. In fact, the Court

states while Henderson is being examined, ". . . but I'll tell the jury right now that both the government and the defense have a right and duty to prepare for trial."

Whitfield advises that he knows Serafin (278a) and saw Evans "lying on tep of" the victim (284a).

Kenneth Wilson at the request of the prosecutor, actually went over to where Evans was sitting and pointed him out (294a-295a). The reason given at side bar is ". . . I want him to identify Evans. Evans is under subpoena and should be in the courtroom" (293a).

In a small community who can say whether or not the jurors also knew who Serafin was and saw him present in Court? Without an evidentiary hearing, we cannot tell where he was sitting and if it was next to Evans.

The Court magnified this deficiency in proof by stating that *defendant has "compulsory process to obtain witnesses, . . ."* (301a) that Evans was in the car with Miss Snarey and Paris (310a), by going over Paris's defense including the invitation of Miss Snarey and concludes that "Mr. Whitfield confirmed Mr. Paris's story" (311a).

The jury must have observed that no one else confirmed the story of defendant including Serafin and Evans who would have been the best witnesses.

Paris was tried separately and the other three defendants together (Opinion, 342a). All were convicted of consentual statutory rape and acquitted of forcible rape (Opinion, 343a). The Court summarizes:

> *"Paris and Evans took the stand in their own defense and in separate trials each told very much the same story,* i.e., they mounted the prosecutrix in

> the automobile but through failure of erection were unable to achieve either penetration or climax. Serafin and Ragganini did not take the stand and by their pleas of not guilty denied the whole transaction. . . .
>
> Serafin and Ragazzini offered no evidence whatsoever."

Without the aid of Serafin and Evans, the jury had only the conflicting testimony of defendant and the victim to resolve. They apparently did not believe her on the issue of force.

What would have been the result if Serafin and Evans had at least been subpoenaed, sworn, advised of their privilege against self-incrimination in front of the jury by the trial judge and then required to testify until they rightfully claimed the privilege and were then excused. (The trial Judge in his Opinion admits he would have honored this claim of privilege if made.)

Instead of oath against oath, it could have been three against one and Paris acquitted especially if Evans told the same story as Paris. (The lower court opinion recalls that Evans did testify in his own separate trial.)

Although indicted for the same crime as Paris, Evans and Serafin were still available to him as witnesses. If called, the Court would have been required to warn them of their privilege against self-incrimination (*Com. ex rel. Esterline v. Esterline*, 1956, 181 Pa. Superior Ct. 532, 539, 124 A. 2d 133, 137) and instruct the jury both why they could not be required to testify and that no adverse inference could be drawn against Paris because of his inability to force their testimony. *Com. v. Crow*, 1931, 303

Pa. 91, 101 (jointly indicted defendants who were separately tried and convicted but asking for new trial must testify until privilege against self-incrimination properly invoked, if not called "trial judge was not required to instruct the jury they could not be called as such"); 19 PS 681 ("All persons shall be fully competent witnesses in any criminal proceeding before any tribunal"); see also *Com. v. Ferrell*, 1935, 319 Pa. 441, 443; 19 PS 631 ("except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to incriminate him; . . ."); Com. v. Francis, 1963, 191 A. 2d 884, 891, 201 Pa. Superior Ct. 313, 325 (persons under indictment for same crime as defendant, available to him as witnesses); *Com. v. Miller*, 1965, 208 A. 2d 867, 205 Pa. Superior Ct. 297.

It was "natural and irresistible" that the uninstructed jury infer that Evans and Serafin would not corroborate Paris especially when a recess was granted to permit defendant to interview them. *Griffin v. Cal.*, 1965, 380 U.S. 612, 614, 85 S. Ct. 1229, 1232; *Com. v. Fusci*, 1935, 117 Pa. Superior Ct. 379, 384 (see 313a for similar "experience in life" charge between trial and Fusci court).

Thus, Evans took the stand in his own case. His testimony would have helped Paris. Counsel for Paris and Evans were identical (Mr. Finder, who represented Evans at trial is the same office associate of Bell who represented him at the preliminary hearing.)

However, presenting evidence as a Paris witness would have given the Commonwealth a preview of his

testimony and given the District Attorney opportunity to better prepare for his coming trial.

How could counsel protect Evans as a witness and still present him as an aid to Paris? How could Bell maneuver Evans' possible claim of incrimination at the Paris trial and still force all nonprivileged testimony from him? How could he argue Evans should talk and at the same time that he could not be forced to?

It is obvious that under Pennsylvania appellate authority that dual representation of Evans and Paris deprived the latter of a knowledgeable eyewitness whose corroborating testimony might have resulted in his acquittal. Com. v. James, 1968, 240 A. 2d 368, 369, 429 Pa. 230, 232 (proof that dual counsel refused to permit one client to testify for another would be reversible error); Com. v. Meehan, 1963, 187 A. 2d 579, 409 Pa. 616 (dissenting opinion of Judge Flood that counsel must be free to make argument even if other defendants hurt adopted).

Serafin did not testify in his own trial. His testimony was vital to Paris. Bell could not call Serafin to help Paris without hurting him. He should have called Paris to help Serafin even though that defendant remained silent at his own trial. The strategies of Serafin and Paris were diametrically opposed. They should not have been represented by the same counsel.

If Serafin were called, he might have given damaging evidence against himself before the Court sustained his claim of privilege. How could Bell require his testimony for Paris and still protect him for his future trial at which he would not testify at all? His appearance for Paris might require a change of strategy in his own defense.

The undenied Petition of District Attorney Costa specifically alleges what should be apparent.

> "In addition, Attorney John F. Bell also discussed the case extensively with the other two defendants, Robert Ray Ragannini and Michael Joseph Evans, and their attorneys." (Paragraph 11)
>
> "Following his taking the office of District Attorney, it was brought to the attention of Jess D. Costa that John F. Bell, one of his assistants, participated in the trial of the defendants, Peter Paris and Marion Joseph Serafin, and had extensively discussed the case with the other defendants, Michael Joseph Evans and Robert Ray Ragannini." (Paragraph 13)

Ethics would foreclose counsel from using the confidences of Evans and Serafin to help Paris and vice versa. Barber v. Page, 1968, 80 S. Ct. 1318, 1321, footnote 1, 390 U.S. 719, 722, fn. 1.

The American Bar Association Canons of Professional Ethics were adopted by our Supreme Court and made effective March 30, 1939 by Pa. R.C.P. 205.

Counsel is required "to present every defense that the law of the land permits" (Canon 5); disclose all conflicts to his client; not disclose his confidences nor accept retainers "from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed" (Canon 6); give his client "entire devotion" and the benefit of his learning and ability with nothing withheld including all remedies and defenses (Canon 15) and to preserve his confidences and refuse conflicting employment without his consent even after

the case is over (Canon 37). *"Within the meaning of this Canon (No. 6), a lawyer represents conflicting interests when on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."*

Dual representation which restricts cross-examination is reversible error without show of prejudice. The trial court should act sua sponte. **Glasser v. U. S.**, 1941, 315 U.S. 60, 70-72, 75. See also *Com. v. Robertson*, 1967, 234 A. 2d 61, 62, 211 Pa. Superior Ct. 79, 80 (if conflict proven, show of prejudice unnecessary; prophylactic rule applies).

The rules of *Com. ex rel. Lucas v. Russell*, 243 A. 2d 184, 212 Pa. Superior Ct. 478, affirmed by a divided Supreme Court November 29, 1968 at 248 A. 2d 37, 432 Pa. 357; *Com. v. Wilson*, 1968, 240 A. 2d 498, 501, 429 Pa. 458, 463, and *Com. v. Resinger*, 1968, 248 A. 2d 55, 432 Pa. 398, do not here apply because there the other jointly-represented defendant was called and did corroborate the now complaining defendant.*

However, here we do have a sacrifice of one client for the other plus the inconsistent position and the neglect which those three cases declare would have been sufficient to obtain reversal (240 A. 2d at 501, 429 Pa. at 463; 248 A. 2d at 56, 432 Pa. at 400).

It is respectfully submitted that this 21 year old defendant (228a) should not be chargeable with the legal sophistication to be aware of and object to this problem which even appeal courts find difficult to apply. See dissenting opinion in *Resinger*, supra, 248 A. 2d at 57, 432

---

* But see *Com. v. Small* (decided May 9, 1969), 434 Pa. 497, 254 A. 2d 609, for a 3-3 decision of the Supreme Court on this issue.

Pa. at 403 and in *Lucas*, supra, 248 A. 2d at 38, 432 Pa. at 359.

---

(4) The Aiding and Abetting Phase of the Case

Although Paris was not charged with aiding and abetting and had been separately indicted, the Court charged on this element of the case. The constitutional issue raised by this technique is discussed infra, p. 45:

> "If you believe that Peter Paris was an active participant here in the crime of rape and that the victim was forcibly raped, there is evidence to establish his conviction for forcible rape, even if you believe he did not actually rape the victim." (316a)
>
> "For instance, if you believe he used force on her and held her while somebody else did it. There was some testimony of that sort, of his use of force on her. However, she had identified him as the one who raped her first, and the main thrust of the government's case is to direct, forcible rape, not to indirect rape." (317a)

We do not know whether Paris was convicted for being an accessory to 1966 amended statutory rape or a principal, or both.

The swearing in plus testimony of Evans and Serafin up to the point they claimed the privilege against self-incrimination was vital to Paris in his defense against this facet of the case.

Paragraph 7 of Paris's lower court reply brief is adequate answer to that jurist's observation that Kasturias is still on the case (Opinion, 351a).

"Paris did not discharge his trial counsel because he had no money to pay special counsel to prepare the entire argument. He felt that trial counsel still retained the burden of moving for the new trial on trial errors whereas special counsel would argue the question of conflict of interests. He did not have money to pay two lawyers for the same thing. In the event a new trial is granted, he would discharge trial counsel and proceed with special counsel. No prejudice can exist in the argument of a Motion for a new trial because the conflict of interest terminates when the jury brings in its verdict."

It is respectfully suggested that President Judge Sweet, an acknowledged legal scholar, could not have read *U. S. ex rel. Darcy v. Handy*, 3 Cir., 1963, 203 F. 2d 407, and the three law review articles cited in footnote 5 of his opinion (351a) and still rely upon them to support his opinion that only court appointment of counsel protects defendant from the prejudice of dual representation because private retention is not 14th Amendment state action (Opinion, 351a).

The right to counsel in a state prosecution is a Sixth Amendment, not a 14th Amendment, privilege. *Gideon v. Wainwright*, 1963, 372 U.S. 335.

(1) *Handy*, decided ten years before, involved the 14th Amendment right to a trial free from community hysteria plus defense by competent counsel for three defendants who were separately tried. The majority opinion there simply does not support President Judge Sweet when it observed (203 F. 2d at 417):

"Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by

himself or by members of his family or his friends *rather than appointed by the Court.*"

The concurring opinion concludes that American Bar Association conflict of interest ethical standards apply to both retained and court-appointed attorneys who are required by the 14th Amendment to give the client complete loyalty (303 F. 2d at 427). "It is the duty both of the trial judge and the prosecutor to see that the essential rights of the defendant are preserved." (*Hendy*, 303 F. 2d at 427, footnote 12); Glasser v. U. S., 1941, 315 U.S. 60, 76 (Court to act sua sponte).

(2) 49 *Virginia Law Review* 1531, although more concerned with effectiveness of counsel, criticizes the state action rule (p. 1535), observes that the Courts are equivocal in applying it (p. 1531), advises that the attorney must bring the problem to the attention of the trial court but that a court of appeals can reverse regardless if the conflict exists (p. 1546), discusses the rationale of the conflicting decisions but rejects the idea of client responsibility for his lawyer agent due to inability of the former to make an educated choice and decision until it is too late (p. 1552) and concludes that the old 14th Amendment rule has been superseded by the Sixth Amendment right under *Gideon v. Wainwright*, which has substituted a "fair trial" test applied to both federal and state defendants (p. 1556).

(3) 78 *Harvard Law Review* 1434 concludes that *Gideon v. Wainwright* has substituted a Sixth Amendment "fair trial" right for the old 14th Amendment "special circumstances" test of *Betts v. Brady* and the 14th Amendment state action standard of *Hendy* (p. 1447) and criticizes the appointed vs. retained decisions.

(4) 59 *Northwestern Law Review* 289 (1965) is both critical of the retained vs. appointed line of cases and observes that they have been either relaxed (p. 296), rejected (pp. 300, 334-335), or given only lip service (p. 301) subsequent to which the appeals court reviews the record to determine if defendant received a fair trial (p. 303).

Even if Serafin and Paris were material witnesses and not defendants, counsel would still have a conflict problem, but Paris required to show prejudice (59 NLR 335) which showing he believes he has made.

The trial judge knew of this problem from the motions pending before him plus his ex parte examination of the trial list (44a, 45a). He took no steps to correct it. Surely, 21 year old Paris (228a) should not be held responsible.

No one likes to turn down an additional fee for trying the same case. Only a severe prophylactic rule will encourage trial courts to enforce this conflict idea and deter joint representation at its inception with the sanction for failure appellate reversal.

The issues discussed in this question were raised in the trial court by a Motion to strike the conviction and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

---

2. What is the purpose of giving defendant constitutional rights if the trial judges advises the jury that asserting them gives him an advantage?

This issue was raised at trial, preserved by New Trial Motion Point No. 26 and in the appeals to the Superior and Supreme Courts of Pennsylvania.

The lower court instructs the jury that defendant has "a very considerable advantage here" (301a) when he asserts his constitutional rights. Obviously, he had no advantage at all. The Constitution only requires the Commonwealth prove its case without defendant's assistance.

This type of comment should be condemned as quickly as was reference to defendant not taking the stand in *Griffin v. Cal.*, 85 S. Ct. 1229, 380 U.S. 609.

By making this comment, the court gave defendant his rights and then took them away by an unfair argument. *Com. v. Didio*, 212 Pa. Superior Ct. 51, 58, 239 A. 2d 883, 886 (Ct. gives lip service to corrupt testimony of accomplice requirement); *Com. v. Towber*, 152 A. 2d 917, 919, 190 Pa. Superior Ct. 93, 97 (reversible error for Court to ask jury determine motive of defendant in claiming privilege against self-incrimination when confronted by incriminating statement of another defendant.)

---

3. It is respectfully submitted that defendant's privilege against self-incrimination under the 5th and 14th Amendments to the Constitution of the United States prevents trying him before the same jury for both forcible and statutory rape because he must testify to the victim's consent to defend against forcible rape and is thus coerced to present personal evidence sufficient to convict himself of statutory rape.

Defendant objected to trial on forcible and statutory rape at the same time (22a). His motions were unsuccess-

ful (23a). The issue was preserved by new trial points 2, 11 and 28 (328a, 329a, 330a).

Passing over the question of improper amendment of the indictment, the Court advised the jury that forcible rape is "against her will" and statutory rape is "with her consent" (305a).

Paris's defense was the victim's consent to his attempt at intercourse which was frustrated by failure to have an erection (234a-236a).

He was the only witness who could say that the victim agreed when we come right down to it. Failure to give this information made conviction on the more serious common-law rape count almost certain.

To defend, he was required to admit his presence at the scene and the attempt which alone was sufficient to sustain a verdict of attempted statutory rape or statutory rape if the jury did not believe he failed.

A. In all cases where trial for both statutory and common-law rape was approved, the defendant was convicted of both crimes. Since he received only one sentence, he had no ground for complaint. *Com. v. Cox*, 1967, 209 Pa. Superior Ct. 457, 228 A. 2d 30 (a 1964 offense); *Com. v. Garybush*, 1948, 12 Fayette 47; *Com. v. Samyan*, 1933, Montgomery County, 21 D. & C. 401.

No case has been discovered approving this idea where defendant was acquitted on either charge or where the offense occurred subsequent to the May 12, 1966 amendment.

As *Cox* observes (footnote 2), consent was no defense when the victim was under 16. Thus, no one could or did raise the privilege against self-incrimination problem pre-

vious to the 1966 amendment and research has disclosed no one who has done so as of this date.

The trial judge recognized the problem and unknowingly overruled *Cox* (228 A. 2d at 35, 209 Pa. Superior Ct. at 467) by directing the jury "You can't find him guilty of both" (312a). If he was wrong, the matter should at least be remanded to permit him to decide if a new trial should be granted because of his misconception of the law. *Com. v. Moon*, 1955, 383 Pa. 18, 29, 117 A. 2d 96, 102 (lower court misconstrues 1951 Mental Health Act, case remanded to give him opportunity to decide under correct standard).

The lower court's reliance on *In re Lane*, 135 U.S. 443, 448, is misplaced. Although defendant was there charged with common-law and statutory rape, the trial judge deleted the elements of force from the indictment and charged only on statutory rape for which defendant was convicted.

Since the State court had jurisdiction of both defendant plus the crimes, federal habeas corpus was held to be an improper remedy especially when defendant understood the charges and did not even ask the District Attorney to choose one or the other before the trial began.

The legislature has declared common-law and statutory rape to be different both in their elements and penalties. Defendant should be charged with the specific rather than the general crime. *Com. v. Buzak et al.*, 1962, 197 Pa. Superior Ct. 514, 518, 179 A. 2d 248. (Unemployment Compensation Act defines false pretense under Act; prosecution for Penal Code false pretense improper.)

B. Joining inconsistent counts of common-law and statutory rape forces defendant to choose between waiving

his privilege against self-incrimination and testifying to consent or risking almost certain common-law rape conviction if he does not.

Any type of procedure which makes attractive waiver of a constitutional right and, in particular, the privilege against self-incrimination, has been held reversible error. **U. S. v. Jackson,** 1968, 88 S. Ct. 1209, 1211, 1216, 390 U.S. 570, 572, 581-582 (unconstitutional to require defendant waive jury trial in order to escape possibility of death penalty); *Garrity v. N. J.*, 1967, 87 S. Ct. 616, 619, 385 U.S. 493, 498 (police officers asserting privilege discharged); *Spevak v. Klein*, 87 S. Ct. 625, 628, 385 U.S. 511, 515 (attorney claiming privilege in judicial inquiry disbarred); *Griffin v. Cal.*, 380 U.S. 609, 85 S. Ct. 1229 (sanction making assertion of 5th amendment privilege "costly" unconstitutional); *U. S. v. Green*, 1957, 355 U.S. 184 (defendant acquitted of first degree but convicted of second degree murder; unconstitutional to retry him on first degree murder at price of obtaining a new trial on second degree conviction); *NLRB v. Industrial Union of Marine Ship Building Workers of America, etc.* (1968), 88 S. Ct. 1717, 1722, 391 U.S. 418, 425 (chilling effect of making defense procedure choice held unconstitutional).

Stevick v. Com., 1875, 78 Pa. 460, held joinder of rape and assault and battery with intent to ravish proper but forecast an opposite decision if "the offenses are *repugnant* in their nature and legal incidents, and the trial and judgment are so incongruous as to tend to deprive the defendant of some legal advantage" (78 Pa. at 468) or "where two offenses are charged, where the defendant can make it appear that this mode of proceeding would subject him to unreasonable difficulty or embarrassment on his trial, the courts have it in their power to protect

him by quashing the indictment or compelling the prosecutor to elect on which count he will proceed or discharge the defendant from the other" (78 Pa. at 464).

The United States Supreme Court at 89 S. Ct. 488 on December 16, 1968 granted certiorari in *Maxwell v. Bishop*, 398 F. 2d 138 (D.C. Cir.), to decide the question "whether Arkansas' single-verdict procedure which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination, on the guilt issue, violates the 5th and 14th Amendments." It is respectfully suggested that a defendant decision in *Maxwell* would require reversal in *Paris*.

---

4. It is respectfully submitted that the 6th and 14th Amendments do not permit Court instruction on aiding and abetting when defendant is indicted and tried separately as a principal.

This point was preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

The grand jury indicted defendant separately as a principal. Nowhere is he warned that the Court would charge on aiding and abetting at the very end of a trial (316a-317a) in which other defendants were not participants.

The conviction cannot go beyond the specific charge of the indictment. *Garner v. La.*, 368 U.S. 157, 168; **Appeal of Gault**, 1967, 87 S. Ct. 1428, 1446, 387 U.S. 1, 33 (notice of charges must be given sufficiently in advance

of trial to permit adequate preparation).

Aider and abetter and principal are separate offenses. **U. S. v. Pereria**, 314 U.S. 1, 11. Whether or not defendant indicted as a principal can be held to answer as aider and abetter without a specific charge in the indictment has been left open by the United States Supreme Court. *U. S. v. Price*, 1966, 86 S. Ct. 1152, 1158, 383 U.S. 787, 796.

Since this instruction came at the very end of the trial, it required special care since the jury would remember it best. *Bollenback v. U. S.*, 1946, 326 U.S. 607, 611, 614; **Com. v. Berkenbush**, 1920, 267 Pa. 455, 460.

We cannot really know whether or not defendant was convicted as an aider or abetter to statutory rape or as a principal. It is suggested that this error is fundamental and sufficient alone for a new trial.

---

5. It is respectfully submitted that a defendant bound over to and indicted by the grand jury for forcible common law rape cannot be convicted of statutory rape within the meaning of the 6th and 14th Amendments to the Constitution of the United States.

This issue was preserved by pre-trial motion, at trial, in the Motion for a new trial and preserved on appeal in the Superior Court and in the Supreme Court of Pennsylvania.

"The issues at trial in all court cases shall be defined by the indictment." *Pa. R. Crim. Pro.*, p. 213(a).

1. Common-law rape required force. The woman's consent was a complete defense unless she was under ten

years of age in which event she was conclusively presumed to be incapable of giving it if under seven, but only rebuttably presumed to be incapable if between seven and nine.

The Act of May 19, 1887, P. L. 128, §1 (reenacted in 1939, 18 PS 4721, with an increase in penalty only) expanded inability to consent.[5]

Although called "statutory rape" by Bench and Bar and held not to be an included offense of common-law rape, it was not so named in the statute.

Although the legislature applied the identical range of punishment for both crimes, consentual rape was punished less severly the nearer the victim approached the cut-off age of 16. *Com. v. Exler*, 1914, 243 Pa. 155, 159, 161; *Com. v. Exler*, 1915, 61 Pa. Superior Ct. 423; *Com. v. Bowes*, 1955, 166 Pa. Superior Ct. 625; *Com. v. Wink*, 1951, 170 Pa. Superior Ct. 96, 120; *Com. v. Nadolny*,

---

[5] "Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, or whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years, with or without her consent, is guilty of rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years, or both.

Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication. 1939, June 24, P. L. 872, Sec. 721."

1949, 163 Pa. Superior Ct. 517, 519; *Com. v. Shrodes*, 1946, 354 Pa. 70, 71.

2. The Act of May 12, 1966 (18 PS 4721, Pocket-parts) placed common-law and statutory rape in different paragraphs, revoked the old reference to the 16 year old victim, redefined both crimes, created separate penalties for each and, for the first time, named the new offense "statutory rape".[6]

3. Before the preliminary hearing began and in order to clear up the ambiguity of the information[7] counsel asked whether the charge was common-law or statutory rape. He was advised by the District Attorney himself that the Commonwealth theory was forcible common-law rape.

> "For the record, before we waive the reading, I believe we had a talk with the District Attorney wherein he was going to state for the record a clear position as to what he intended to prove here and what the charges actually are.
>
> Mr. Fergus: It is the Commonwealth's contention and we will attempt to prove forcible rape. We are also mindful of the fact that the charges made would include lesser offenses to be found by a jury and have no right to change what a jury might do. The lesser offenses could be statutory rape, assault or assault with intent to ravish, but it is the Commonwealth's intention today to offer evidence which we feel is a prima facie case on forcible rape.

---

[6] (See page 6 of this petition.)

[7] (5a, 9a)

> **Mr. McIlvaine: At this time for the record I would like to take issue with the District Attorney that statutory rape is a lesser offense under the Code. . ." (9a)**

Consistent with his position before the Alderman, the prosecutor presented a common-law rape indictment to the grand jury which approved it.[8]

Although containing two counts, the indictment charges only forcible common-law rape. When an under 16 year old victim submits to force, the crime is both common-law and statutory rape. Com. v. Cox, 1967, 209 Pa. Superior Ct. 457, 467, 228 A. 2d 30, 35, footnote 2. Therefore, the prosecutor was correct that the crime of forcible rape could be statutory rape also when the victim was under 16. However, this did not put defendant on notice that he might be charged with the 1966 type of statutory rape which now requires consent.

4. When the Court amended the first count by deleting the words "without her consent", the picture did not change. Defendant was still charged only with two counts of common-law rape, the former for a girl under 16 and the latter for using force generally.

The words "force and arms" in Count One covered lack of consent without specific use of that phrase. Com. v. Carpenter, 1953, 172 Pa. Superior Ct. 271. Thus, defendant was indicted for forcible rape and convicted of consentual rape. The conviction cannot stand. Com. v. Ashmore, 1956, 8 D. & C. 523 (conviction of statutory rape on common-law rape indictment reversed sua sponte);

---

[8] (10a-11a)

U. S. v. Russell, 369 U.S. 749; *U. S. v. Roach*, 1963, 3 Cir., 321 F. 2d 1 (count in indictment does not contain necessary word "knew"; court charges defendant can be guilty on all counts; fundamental error to permit jury to deliberate on defective count even without request for instructions); *Cole v. Arkansas*, 333 U.S. 196 (1947).

5. By paragraph (a), the crime of statutory rape, as it then existed, together with the phrase "with or without her consent" were completely repealed by enclosing them in brackets. **Com. v. Hallberg**, 1953, 374 Pa. 554, 559 (Pennsylvania Constitution, Article 3, §6, plus 46 PS 581 require abrogated words be enclosed in brackets).

Paragraph (b) then created a new crime of statutory rape which prohibited carnal knowledge of a woman under 16 "with her consent".

Fornication, as previously, requires consent plus bad repute of the victim.

Common-law rape has been returned to its pre-1887 status. It covers only forcible rape plus carnal knowledge of a woman under ten. Such knowledge of a woman between ten and sixteen is now common-law rape without her consent and statutory rape with her consent.

If defendant had been convicted of either common-law or statutory rape as it existed previous to the 1966 amendment, a new trial is mandatory. **U. S. v. Smith**, 1956, 3 Cir., 232 F. 2d 570 (crime not to place stamp on liquor repealed; tearing of stamp now required; conviction on repealed law reversed even though sufficient guilt thereunder proved).

It is apparent that defendant cannot be charged with common-law rape by force of a girl under 16 and con-

victed of statutory rape "with her consent" when he has neither been bound over to nor indicted by the grand jury on this crime.

It is suggested that the trial judge had no authority to allow amendment to the indictment at trial and that even if he did, he should have declared a mistrial because of genuine surprise caused by this change in attack by the prosecution.

This problem is preserved by post-conviction motions Nos. 1, 2, 4, 11, 12, 13, 21, 22 and 28 and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

Article 1, §10 of the Pennsylvania Constitution directs, "No person shall, for any indictable offense, be proceeded against criminally by information, . . ." As rape is certainly an indictable offense, the Court was without authority to change the charge without resubmitting the question to the grand jury. *U. S. v. Russell*, 369 U.S. 749, 770; *Stirone v. U. S.*, 361 U.S. 212; Com. v. Cohen et al., 1964, 199 A. 2d 139, 145, 203 Pa. Superior Ct. 34, 43.

It is respectfully submitted that the indictment did not charge statutory rape substantially in the language of the Act of Assembly prohibiting it as required by *Pa. R. Crim. Pro.*, p. 213, and further that the defect was a matter of substance and not form so that the amendment charged not only a different offense but required a continuance under the specific provisions of *Pa. R. Crim. Pro.*, p. 220.[9]

---

[9] "The court may allow an indictment to be amended where there is a defect in form, the description of the offense, the description of any person or any property, or the date charged pro-

A. The indictment, as amended, after the court deleted "without her consent" did not change the charge. Defendant still went to trial on a specific charge of forcible rape. The error was in the Court charging on consent when defendant had not been indicted on this theory.

The trial judge would have been correct in observing (19a). "The district attorney doesn't have to prove the presence of consent in order to make out the presence of statutory rape" if he were discussing the pre-1966 situation. He would have also been correct if he did not charge on consent and statutory rape but only advised the jury that if they found consent, they must find defendant not guilty as indicted.

His entire discussion of consent deals with lowering the offense to statutory rape as defined by the 1966 amendment even though defendant was not charged with this (304a-306a, 307a, 312a, 313a). Additionally, the Court gave no instruction concerning inability of a woman under 10 or under 16 to consent. The charge was thus defective in this aspect.

> **"Whoever has unlawful carnal knowledge of a woman, forciby and against her will, is guilty of rape." (304a)**
>
> **"Whoever being of the age of 16 years and upwards, unlawfully and carnally knows and abuses any woman child under the age of 16 years *with her consent* is guilty of statutory rape." (305a)**

---

vided the indictment as amended does not charge an additional or different offense. Upon amendment the court may grant such a postponement of trial or other relief as is necessary in the interests of justice."

> "If you believe that he had intercourse with her *but that she consented voluntarily* to have sexual intercourse with him, then you can find him guilty of statutory rape. You can't find him guilty of both." (312a)

As the Court points out in footnote 3 of his Opinion (347a), the jury is presumed to follow his instructions. See also *Spencer v. Texas,* 87 S. Ct. 648, 653, 385 U.S. 554, 562. It is thus apparent that if the jury followed the Court's instructions they found no force but consent. They have thus convicted defendant of something for which he was not indicted and for which default the Court could not grant an amendment.

The indictment as amended did not charge the crime of 1966 statutory rape. Defendant has been convicted on an indictment for statutory rape which did not charge a crime. *U. S. v. Kessler,* 3 Cir., 213 F. 2d 53, 56.

Defendant was aware that the indictment was defective. Both in his pre-trial motion presented September 5, 1967 and denied October 5, 1967 and resubmitted (17a-18a) before the jury was sworn and again denied he stated that statutory rape cannot be "without her consent".

He also claimed that he had not been given a hearing on statutory rape at the issuing authority level. Obviously, consent could not have been proved there without the testimony of Miss Snarey at which point defendant could begin to develop evidence of her reputation on cross-examination. Mr. Bell observes, "We have never had a preliminary hearing on statutory rape" (23a).

Bad reputation is no defense to forcible rape. Just before trial began, defendant was advised by the Court that he must also defend against 1966 amendment statutory rape to which a defense would be bad repute. Obviously, bad repute is no defense if force is claimed. The Court rules:

> "I think I'm going to permit the District Attorney's amendment and grant an exception for the prisoners here." (21a)

Defendant responds (22a):

> ". . . we are entitled to a continuance to prepare for a defense on statutory rape. In the squire's office, the transcript specifically stated that he was proceeding on the charge of forcible rape. They are both inconsistent crimes, rape and statutory rape being inconsistent and requiring different defenses."

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" "The 'initial hearing' in the present case was a hearing on the merits. Notice at that time was not timely; . . ." **Application of Gault**, 387 U.S. 1, 33, 87 S. Ct. 1428, 1446 (1967).

Although the trial court is correct in his Opinion (348a-350a) that defendant had from June 14, 1967 until October 9 of that year to prepare, he is incorrect in regard to getting ready for the amended indictment for which he was given no time at all. Defense demurs (175a) at the close of the Commonwealth's case "for the reason stated in Chambers earlier, that the indictment as amended

fails to allege an offense and the element of consent required by the statute is not proven by the Commonwealth". The Court's response "statutory rape is still a lesser included count of rape" does not meet the issue.

---

6. Although evidence of the alleged sodomy was properly admitted as part of the background to the alleged crime, the trial court did not properly protect defendant as required by the 5th Amendment by advising why the evidence was admitted and did not properly admonish them that defendant was not being tried for sodomy.

This issue was raised by defendant's lower court motion to strike the conviction and preserved on appeal to the Superior and Supreme Courts of Pennsylvania. In describing the events before and after the alleged rape, the victim advises the jury that Paris forcibly "stuck his penis in my mouth" (52a) and that Serafin "made me do the same thing" (53a).

The lower court defined rape as "carnal knowledge" (305a, 306a) or "carnally knows or abuses . . ." (305a), "unlawful sexual intercourse" (305a) "unlawful consentual intercourse . . ." (306a).

Nowhere is the oral sex distinguished from the vaginal. The Court recalls defendant's "sexual intercourse", the victim's wrenched neck (308a) and charges, "if you believe that he had *intercourse*", "sexual intercourse", etc. (312a, 314a) he can be guilty and concludes (312a-313a). "If you believe that he did not have *intercourse* with her, that is to say, if you have not been con-

vinced beyond a reasonable doubt of proposition one or proposition two, and therefore have not been convinced that he had intercourse with her *one way or the other*, then you would acquit him." (Emphasis supplied.)

The Random House Dictionary of the English Language (p. 225) defines "carnal" as inter alia, "pertaining to or characterized by the flesh or the body, its passions and appetites; sensual: Fleshy, bodily, animal, lustful, lecherous, lascivious, libidinous, concupiscent."

"Carnal abuse" "Law. Any lascivious contact with the sexual organs of a child by an adult, esp. contact *not* involving sexual intercourse. Rape, esp. of a young girl."

"Carnal knowledge, chiefly law. Sexual intercourse."

"Intercourse". "Sexual relations or a sexual coupling, esp. coitus" (p. 740).

With no instruction as to why the oral intercourse was admitted, the average juror certainly could believe it was included in the offense. Why would it have been brought to their attention otherwise if this were not so? The words "one way or another" were at least confusing in this setting.

When evidence of other uncharged crimes is admitted for even a proper purpose, failure to give limiting instructions even without request is reversible error. **Com. v. Wright**, 1964, 415 Pa. 55, 60-61, 202 A. 2d 79, 81; *Com. v. Kline*, 1949, 361 Pa. 434, 439, citing *Com. v. Lipschutz*, 89 Pa. Superior Ct. 142. See *Com. v. Scoleri*, 1968, 245 A. 2d 295, 299, 432 Pa. 571, 580, where limiting instructions were given and where the problem is discussed and *Com. v. Williams*, 1968, 248 A. 2d 301, 305, 432 Pa. 557,

564 (erroneous charge on reasonable doubt can be raised sua sponte by appeal court).

It is respectfully suggested that *Michelson v. U. S.*, 335 U.S. 469, 475 would require that this general situation be branded 14th Amendment reversible error.

---

7. When the lower court discussed defendant's case ex parte with the prosecuting attorney, he should have disqualified himself upon motion as trial judge especially when he refused to state what occurred and placed the burden to show prejudice on defense counsel who was not there.

Defense discovered that the trial judge had met ex parte with the prosecutor (13a-17a). He asked this jurist to disqualify himself. The answer was no (14a). The issue was preserved in the new trial motion by Objection No. 5 (328a) and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

It is apparent that at least pending motions which would delay the trial were involved (15a-16a).

> "Mr. Kusturiss: It has come to the attention of counsel for defendant that the District Attorney's Office had a conference with the Honorable Judge Sweet on Thursday with reference to this case and without defense counsel being advised of this meeting. A certain order dated the 5th day of October 1967 was made by the Court. For this reason, we move that the Court disqualify itself to hear the case

and ask that the case be continued until the next term of court." (13a)

"Mr. Hirsch: Keep in mind we are very much interested in knowing the determination of the motions at that time. Had those motions not been determined, the trial would have been delayed." (15a)

"Mr. Fergus: . . . it was a procedural meeting as has been described by both Mr. Townsend and for the purposes that were discussed by Mr. Hirsch." (16a)

"Mr. Townsend: . . . I told him that we had met with the President Judge of the Court that morning and he had informed us that he would hand down an Order that afternoon and that he had not told us whether or not he would grant or deny the motions." (15a)

The Court refused to reveal what had taken place or even state it was not prejudicial and challenged defense counsel to come forward with evidence everyone knew he could not present. "Now, if you have any proof as to what was discussed in here with me by any person, I would like to hear it." (13a-14a)

"How did you know what, if anything, Mr. Fergus and I talked about?" (14a)

"Unless you have some evidence that something out of line was said, I'm not going to sustain the motion." (14a)

". . . but to suggest there is some impropriety in the scheduling of business and that I have to invite

every one of 160 defense counsel in the room every time the District Attorney comes in here is just going too far." (17a)

Even if we pass over defendant's state and federal constitutional right to be present or represented at every stage of the proceeding, the appearance of impartiality required by **Commonwealth Coatings Corp., Inc., etc. v. Continental Casualty Co.**, 1968, 89 S. Ct. 337, 339-40, 393 U.S. 8, is missing.

Also, "The ordinary rule, based on considerations of fairness, did not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell v. U. S.*, 1960, 365 U.S. 85, 96.

Defendant did not and could not know what took place between Court and prosecutor. Neither would enlighten him nor say he was not harmed. The pending motions were dismissed almost immediately thereafter and the trial in which defendant claims the Court was partial to the Commonwealth (new trial motion, 329a), began. The Court is asked to take judicial notice that the call of the trial list both in civil and criminal cases is usually conducted in open court.

If the prosecutor wanted to discuss the trial date or motions which had been argued before the court en banc (18a), he should have notified his opponent and thus would have avoided the present unpleasant and embarrassing necessity for counsel to raise problem.

8. It is respectfully suggested that placing upon defendant the burden of establishing the bad community repute of the statutory rape victim creates an unconstitutional conclusive presumption which is impossible for him to overcome all in violation of the 5th and 14th Amendments to the Constitution of the United States.

This issue is preserved in the new trial motion point 27 and preserved on appeal to the Superior and Supreme Courts of Pennsylvania.

The Commonwealth was not required to permit any defense to statutory rape, but it did. The rules of due process then apply. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1958).

Defendant could not truthfully present evidence of the victim's community bad repute because her wrongful acts would not be publicly performed. (**Bowles v. Pechersky**, W.D. Pa., 64 Fed. Supp. 641, 645) and would be known only to family and intimate friends who would not volunteer this information to a stranger from another town (**Morrison v. Cal.**, 1933, 291 U.S. 82, 88).

The burden requires defendant rebut a conclusive presumption "incapable of being overcome" (*Carrington v. Rash*, 1965, 380 U.S. 89, 96, 85 S. Ct. 775, 780) and requires him to produce evidence "peculiarly within the knowledge of his adversary." **Campbell v. U. S.**, 1960, 365 U.S. 85, 96.

The jury can convict him on the presumption even if he is fortunate enough to obtain the bad reputation evidence required: *Bailey v. Ala.*, 1910, 219 U.S. 219, 234.

On balance, the aid given to the Commonwealth by this presumption subjects the accused to the hardship and oppression condemned in **Morrison** (291 U.S. at 88) and should be treated in similar fashion here.

CONCLUSION

A fair trial is guaranteed to both the innocent and the guilty. A close issue of credibility magnifies the weight of trial error. *U. S. v. Glasser*, 1941, 315 U.S. 60, 67.

It is respectfully suggested that justice demands a reversal of this conviction and the granting of a new trial at which the objections presented in this Petition can be remedied.

Respectfully submitted,
ALLEN N. BRUNWASSER,
Attorney for Petitioner.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 30 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

No. 276 October Term, 1970

PETER PARIS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JESS D. COSTA,
District Attorney,
ROGER J. ECKER,
Assistant District Attorney,
Washington County,
Attorneys for Respondent.

Court House,
Washington, Pennsylvania 15301.

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	PAGE
Questions Presented	2
Counter-History of the Case	4
Argument:	
I. The common representation of petitioner and one or more co-defendants at a preliminary hearing and thereafter prior to trial does not, per se, deny petitioner his Sixth Amendment right to counsel when all co-defendants are represented by separate, private counsel at trial	6
II. The instructions by the trial judge in the instant case, when read in their entirety, do not violate the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States	8
III. The trial of petitioner before the same jury on charges of forcible rape and statutory rape does not violate petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States	8
IV. Neither the Sixth nor the Fourteenth Amendments to the Constitution of the United States prohibits the trial judge from instructing jury that one who aids and abets in a felony is equally as guilty as a principal therein	10

V. The conviction of petitioner for statutory rape on an indictment charging him with both forcible rape and statutory rape does not violate the Sixth or Fourteenth Amendments to the Constitution of the United States 10

VI. The ex parte discussion between the trial judge and the assistant district attorney before trial as to whether certain pre-trial motions had already been granted does not disqualify the trial judge under the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States ... 13

VII. The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States in the trial of petitioner for forcible rape and statutory rape do not require the trial judge, without a request of defense counsel, to instruct the jury that petitioner was not being tried for sodomy when evidence of an act of sodomy committed upon the prosecutrix by petitioner contemporaneously with her rape is admitted 14

VIII. The creation of a rebuttable presumption in favor of the good reputation of the prosecutrix in a trial for statutory rape does not relieve the Commonwealth of its burden of proving all of the elements of the crime beyond a reasonable doubt and does not create constitutional error 16

Conclusion 17

TABLE OF CITATIONS

CASES:

Com. v. Kline, 361 Pa. 434, 65 A. 2d 348 (1949) . 14

Com. v. Paris, 49 Washington Co. Reports, 42 (1968) 12
Com. v. Paris, 216 Pa. Superior Ct. 803, 264 A. 2d 170 (1970) 4
Com. v. Reilly, 200 Pa. Superior Ct. 461, 190 A. 2d 164 (1963) 10
Crampton v. Ohio, cert. granted at No. 709 (June 1, 1970), 38 U.S.L.W. 3478 (1970) 9
Glasser v. United States, 315 U.S. 641 (1942) ... 6, 7
Glavin v. United States, 396 F. 2d 725 (9th Cir. 1968) 6
Griffin v. California, 380 U.S. 612 (1965) 8
Kruchten v. Eyman, 406 F. 2d 304 (9th Cir. 1969) 7
Lugo v. United States, 350 F. 2d 858 (9th Cir. 1965) 7
Maxwell v. Bishop, U.S. 90 S. Ct. 1578 (1970) .. 9
McGautha v. California, cert. granted at No. 486 Misc. (June 1, 1970), 38 U.S.L.W. 3478 (1970) 9
Watkins v. Wilson, 408 F. 2d 351 (9th Cir. 1969) . 6
Witherspoon v. Illinois, 391 U.S. 510 (1968) 9

MISCELLANEOUS:

Act of June 24, 1939, P. L. §721, as amended, Pa. Stat. Ann. Tit. 18 (Supp. 1970):
§4721 ..... 4, 11
§472(b) 11, 12
Act of May 12, 1966, P. L. 84, §1, 18 Pa. Stat. Ann. Tit. 18, §4721 (Supp. 1970) 11, 12
38 United States Law Week, 3475 (1970) 9
United States Constitution:
5th Amendment 2, 3, 8, 9, 14
6th Amendment 2, 3, 6, 8, 10, 14
14th Amendment 2, 3, 8, 10, 14

Prayer of Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

No. 276 October Term, 1970

PETER PARIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania prays that the Petition for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania be denied.

QUESTIONS PRESENTED

1. Does the common representation of petitioner and one or more of his co-defendants at a preliminary hearing and thereafter prior to trial, per se, deny petitioner his right to counsel under the 6th and 14th Amendments to the United States Constitution when all co-defendants are represented by separate, private counsel at trial?

2. Do the instructions by the trial judge in the instant case, when read in their entirety, violate the 5th, 6th and 14th Amendments to the Constitution of the United States?

3. Does the trial of petitioner before the same jury on charges of forcible rape and statutory rape violate petitioner's privilege against self-incrimination under the 5th and 14th Amendments to the Constitution of the United States?

4. Does the instruction by the trial judge that one who aids and abets in a felony is equally as guilty as a principal participant therein violate the 6th and 14th Amendments to the Constitution of the United States?

5. Does the conviction of petitioner for statutory rape on an indictment charging him with both forcible rape and statutory rape violate the 6th and 14th Amendments to the Constitution of the United States?

6. Does the ex parte discussion between the trial judge and the assistant district attorney before trial as to

whether certain pre-trial motions had already been granted disqualify the trial judge under the 5th, 6th and 14th Amendments to the Constitution of the United States?

7. In the trial of petitioner for forcible rape and statutory rape do the 5th, 6th and 14th Amendments to the Constitution of the United States require that the trial judge, without a request from defense counsel, instruct the jury that petitioner was being tried for sodomy when evidence of an act of sodomy committed upon the prosecutrix by petitioner contemporaneously with the rape is admitted?

8. Does the creation of a rebuttable presumption in favor of the good reputation of the prosecutrix in a trial for statutory rape create a constitutional infirmity by relieving the Commonwealth of the burden of proving all the elements of statutory rape beyond a reasonable doubt?

COUNTER-HISTORY OF THE CASE

Petitioner was tried before a jury at No. 229 Quarter Sessions, 1967, in the Court of Common Pleas of Washington County, Pennsylvania, upon an indictment charging him with forcible rape and carnal knowledge of a female under the age of sixteen (16), so called as "Statutory" rape, under the Act of June 24, 1939, P. L. §721, as amended, Pa. Stat. Ann. Tit. 18, §4721 (Supp. 1970). The jury found petitioner guilty of statutory rape. A motion for a new trial, a motion in arrest of judgment and a motion to strike the conviction were subsequently filed in which the same issues presented herein were raised. After oral argument before the court en banc, these motions were denied. The trial court subsequently imposed a sentence of two and one-half to six years imprisonment on the petitioner.

On appeal to the Superior Court of Pennsylvania, the lower court's decision was affirmed in a per curiam opinion. *Commonwealth v. Paris,* 216 Pa. Superior Ct. 803, 264 A. 2d 170 (1970). A petition for the allowance of an appeal was denied by the Pennsylvania Supreme Court at No. 3257A Miscellaneous Docket, 1970. Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania. By Order of August 4, 1970, the Honorable Wallace S. Gourley, Senior District Judge, denied this petition and held that an evidentiary hearing was not warranted, Civil Action No. 70-772. By stipulation of counsel for petitioner and counsel for respondent, the appeal of this decision to the United States Court of

Counter-History of the Case

Appeals for the Third Circuit has been held in abeyance pending the determination of this Honorable Court on the instant petition for writ of certiorari.

At trial the evidence showed that on the night of June 14, 1967, the prosecutrix, a fifteen year old girl who was staying with her aunt in Houston, Pennsylvania, made a visit to a drug store. While there she was invited to attend a "party" by two boys. She proceeded with the two boys in their automobile to the vicinity of a slag dump where a large number of other boys subsequently arrived. Included in this group were the petitioner and two companions who had been drinking at a bar and who had been told of the "party" out in the country. Eventually, after some beer drinking by the persons present, four or five individuals prevailed upon the prosecutrix to engage in sexual intercourse in the front seat of an automobile driven to the party by one of the individuals. Four of these boys were later criminally charged. Two of the four also committed acts of sodomy upon the prosecutrix. She finally extracted herself from this situation by leaving the party alone and walking to a nearby highway where she received the assistance of a passerby. The Commonwealth's medical testimony established that the prosecutrix had been a virgin before this incident, that there was proof of recent intercourse, and that the prosecutrix suffered contusions and other physical abuse from this episode.

Petitioner was tried individually before a jury. Three other participants in this crime were subsequently tried together. At petitioner's trial, there was conflicting evidence as to whether his intercourse with the prosecutrix had been forcible or consensual. The jury convicted the petitioner only of statutory rape.

RESPONDENT'S ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. The Common Representation of Petitioner and One or More Co-Defendants at a Preliminary Hearing and Thereafter Prior to Trial Does Not, Per Se, Deny Petitioner His Sixth Amendment Right to Counsel When All Co-Defendants Are Represented by Separate, Private Counsel at Trial

Petitioner contends that the representation of himself and two others by the same counsel at a preliminary hearing and prior to trial presented a conflict of interest, thereby depriving petitioner of his 6th Amendment right to free and unfettered representation. At the preliminary hearing, petitioner and Marion Serafin were represented by Michael E. Kusturiss, Esquire and Michael Evans was represented by John F. Bell, Esquire. Both Kusturiss and Bell entered appearances on the record for petitioner prior to his trial. Only Kusturiss represented petitioner at his separate trial. At the subsequent trial of Serafin, Evans and a fourth accused, Bell represented Serafin and Sanford S. Finder, Esquire, represented Michael Evans. It is thus clear that separate privately retained counsel represented each of the defendants at the time of the trial.

Mere common representation of co-defendants, moreover, is not per se error; a fortiori it is not in itself error of constitutional dimensions. *Watkins v. Wilson,* 408 F. 2d 351 (9th Cir. 1969); *Glavin vs. United States,* 396 F. 2d 725 (9th Cir. 1968). See *Glasser vs. United States,*

315 U.S. 641 (1942). Unless an actual conflict of interest is shown to exist or can be reasonably foreseen, an attorney may in good faith represent several co-defendants. *Kruchten v. Eyman,* 406 F. 2d 304, 311 (9th Cir. 1969). Furthermore, a conflict of interest cannot be manufactured out of mere conjecture as to what might have been shown in the absence of common representation. *Lugo v. United States,* 350 F. 2d 858, 859 (9th Cir. 1965). In the instant case, petitioner has not alleged, and the record does not disclose, any evidence of an actual conflict of interest between petitioner and defendant Serafin. Defendant Serafin did not testify at his own trial nor did he testify at the trial of petitioner. Petitioner did testify at his own trial; however, he in no way implicated Serafin. Also, petitioner did not testify at Serafin's trial.

It is apparently the contention of petitioner that neither he nor Serafin could testify as witnesses for each other because they would thereby lose the privilege against self-incrimination. Petition for Writ of Certiorari at 27-28. This result, however, does not follow from the mere common representation by a single counsel. If it had been the case that petitioner was not involved in the act alleged and if petitioner wished to testify to the effect that the prosecutrix had incorrectly identified petitioner rather than Serafin as the actual assailant, a conflict of interest could have arisen by virtue of the dual representation. Petitioner does not allege that he wished to make such a defense; moreover, he testified that he attempted intercourse but failed because of his inability to obtain an erection.

Respondent therefore contends that there was, in fact, no dual representation by counsel. Furthermore, re-

spondent submits that no actual conflict of interest prejudicing any right of petitioner has been alleged or appears in the record.

II. The Instructions by the Trial Judge in the Instant Case, When Read in Their Entirety, Do Not Violate the Fifth, Sixth, or Fourteenth Amendments to the Constitution of the United States

---

Petitioner contends that he was prejudiced by the trial judge's statement that a defendant's constitutional rights "give him a very considerable advantage here". Petition for Writ of Certiorari at 35. When read in the context of the court's explanation of petitioner's constitutional rights which followed this statement, the comment was clearly not constitutional error. In the instant case, petitioner testified on his own behalf. Certainly it cannot be seriously argued that the comment of the trial judge was the same as the adverse commentary on the failure of a defendant to take the witness stand, which was held to be in error in *Griffin v. California,* 380 U.S. 612 (1965), and which is cited by petitioner as support for his position.

III. The Trial of Petitioner Before the Same Jury on Charges of Forcible Rape and Statutory Rape Does Not Violate Petitioner's Privilege Against Self-Incrimination Under the Fifth and Fourteenth Amendments to the Constitution of the United States

---

Petitioner argues that his trial before the same jury upon counts of both statutory and forcible rape compelled

petitioner to implicate himself in the crime of statutory rape by proving the consent in order to defeat the charge of forcible rape, thereby depriving petitioner of his Fifth Amendment privilege against self-incrimination. The recent decision in *Maxwell v. Bishop,* U.S. , 90 S. Ct. 1578 (1970), does not, as suggested by petitioner, present this question. In *Maxwell v. Bishop,* this Honorable Court vacated the judgment below based on the rationale of *Witherspoon v. Illinois,* 391 U.S. 510 (1968); no opinion was expressed on the issues raised by petitioner herein. 38 United States Law Week, 3475 (1970). Compare: *McGautha v. California,* cert. granted at No. 486 Misc. (June 1, 1970), 38 U.S.L.W. 3478 (1970); and *Crampton v. Ohio,* cert. granted at No. 709 (June 1, 1970), 38 U.S.L.W. 3478 (1970), in which questions equally inapplicable to the instant case were raised: (1) the constitutionality of permitting one jury to determine both the issue of guilt or innocence and also the issue of the penalty to be imposed in a murder case and (2) the constitutionality of the failure of the trial judge to provide standards or directions for a jury in determining the penalty in a capital case.

Moreover, as correctly noted by the trial judge in his opinion denying post-trial motions in the instant case, *in re Lane,* 135 U.S. 443 (1890), finds no infirmity in an indictment charging a defendant with both forcible and statutory rape. Respondent submits that *Lane* clearly controls the disposition of this issue.

Argument

IV. Neither the Sixth Nor the Fourteenth Amendments to the Constitution of the United States Prohibits the Trial Judge From Instructing Jury That One Who Aids and Abets in a Felony Is Equally as Guilty as a Principal Therein

---

Petitioner argues that the trial judge erred in instructing the jury that if they found that petitioner was an active participant in the crime of forcible rape, he would be guilty of the offense even though he himself did not engage in sexual intercourse. Petition at 39-40. The substantive law of Pennsylvania is well established that one who aids and abets in a rape is guilty of the offense. *Commonwealth v. Reilly,* 200 Pa. Superior Ct. 461, 464, 190 A. 2d 164, 166 (1963). Petitioner's contention on this point lacks merit. Although the indictment charged petitioner with direct carnal knowledge of the prosecutrix, it clearly afforded him sufficient notice of the possibility of conviction upon proof that he aided and abetted in a rape.

V. The Conviction of Petitioner for Statutory Rape on an Indictment Charging Him With Both Forcible Rape and Statutory Rape Does Not Violate the Sixth or Fourteenth Amendments to the Constitution of the United States

---

The indictment against petitioner in the instant case contained two counts. In the first count, petitioner was charged with carnal knowledge of a child under the age of sixteen "without her consent". The second charged

the petitioner with forcible rape. Petitioner contends that he was not provided with sufficient notice of the charge of statutory rape under Pa. Stat. Ann. Tit. 18, §4721 (b) (Supp. 1970), by the indictment as originally drawn. This section of the Pennsylvania Criminal Code describes the offense of statutory rape as carnal knowledge of a child under the age of sixteen "with her consent". In its entirety the section states:

> "(b) Whoever, being of the age of sixteen (16) years and upwards, unlawfully and carnally knows and abuses any woman child under the age of sixteen (16) years with her consent, is guilty of statutory rape, a felony, and on conviction, shall be sentenced to pay a fine not exceeding seven thousand dollars ($7,000), or undergo imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding fifteen (15) years or both.
>
> "Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of rape, and be convicted of fornication." §721 of the Act of June 24, 1939, P. L. 872, as amended by the Act of May 12, 1966, P. L. 84, §1, 18 Pa. Stat. Ann. Tit. 18, §4721 (Supp. 1970).

The indictment, as originally drawn, merely compelled the Commonwealth of Pennsylvania to prove a fact unnecessary to establish statutory rape; i.e., that the vic-

tim resisted. The language in the indictment was surplusage. Nonetheless, petitioner obviously had ample notice of a charge of statutory rape by virtue of the two-count indictment charging him with forcible rape, a codified common law offense regardless of the age of the victim, and, statutory rape, an offense dependent upon the age of the victim. The surplusage in the latter count was neither misleading nor error-invoking.

At the outset of the trial, the Commonwealth moved to strike the words "without her consent" from the indictment, thereby leaving it so as to charge petitioner simply with carnal knowledge of a child under the age of sixteen. Petitioner now asserts that no offense was alleged against him because the offense of statutory rape as defined in the Pennsylvania Criminal Code is defined as carnal knowledge of a child under sixteen "with her consent". The trial judge fairly concluded that the Pennsylvania Legislature did not intend to define as offenses only the forcible carnal knowledge of a female and the consensual carnal knowledge of a child under sixteen while leaving unprohibited the nonconsensual but unresisted carnal knowledge of a child under sixteen. *Commonwealth v. Paris,* 49 Washington County Reports, 42, 49-50 (1968). The Honorable Wallace S. Gourley, Senior District Judge in denying petitioner's petition for writ of habeas corpus reached precisely the same conclusion on page 6 of his unreported opinion on that issue. That the act of carnal knowledge of a child under sixteen without her consent is more to be condemned than a similar act with her consent is self-evident. Petitioner therefore submits that §4721(b) contemplates as an offense the nonconsenual but unresisted carnal knowledge of a child

under sixteen and that the amended indictment stated an offense under that provision.

Furthermore, the thrust of petitioner's argument on this point seems to be directed to the allegation that the amendment forced him to forego evidence of bad repute on the part of the prosecutrix. The incongruity of this position is apparent when one notes the vigorous objection by petitioner to the proof of prosecutrix's virginity. No evidence of ill repute was offered in this case, even at side bar conferences. Finally, there was a period of almost four months from the date of the offense on June 14, 1967 until the trial date of October 9. This period offered petitioner an ample opportunity to prepare evidence of bad repute or any other defense available to him.

VI. The Ex Parte Discussion Between the Trial Judge and the Assistant District Attorney Before Trial as to Whether Certain Pre-Trial Motions Had Already Been Granted Does Not Disqualify the Trial Judge Under the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States

---

Petitioner asserts that the failure of the trial judge to disqualify himself at the outset of the trial because of an ex parte discussion with the assistant district attorney in the case prior thereto is constitutional error. From the discussion on the record subsequent to the motion it is apparent that the assistant district attorney and the district attorney had occasion to discuss with the trial judge, out of the presence of the defense counsel, only the ques-

tion of whether certain pre-trial motions had already been granted or would be decided when the trial commenced. Record at 13a-17a. At most, this was only a procedural matter. The discussion concerned neither the merits of the case nor trial tactics. The mere existence of one ex parte communication between the trial judge and the prosecuting attorneys relative to a procedural matter gives rise to no inference of bias requiring disqualification.

VII. The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States in the Trial of Petitioner for Forcible Rape and Statutory Rape Do Not Require the Trial Judge, Without a Request of Defense Counsel, To Instruct the Jury That Petitioner Was Not Being Tried for Sodomy When Evidence of an Act of Sodomy Committed Upon the Prosecutrix by Petitioner Contemporaneously With Her Rape Is Admitted

---

Petitioner submits that it was error for the trial judge to permit the admission of evidence of an act of sodomy committed by petitioner upon the prosecutrix contemporaneously with his having intercourse with her. The indictment did not charge petitioner with sodomy. The evidentiary rule governing this situation is amply set forth in *Commonwealth v. Kline,* 361 Pa. 434, 438, 65 A. 2d 348, 349 (1949) (emphasis added):

> "It is an established priniciple in criminal procedure that proof of the commission of another crime cannot be put in evidence as a proof of the commission of the crime charged, unless there is such

connection between them as to give the fact of the commission of the other crime probative value on the issue of the defendant's guilt of the crime charged. Henry's Pennsylvania Trial Evidence, Third Edition, Section 30, pages 48 and 49, says it is 'a fundamental principle that a prisoner shall not be required to answer for the commission of an offense that is not specially charged against him in the indictment. *But if a criminal conduct proposed to be proved forms in any way a link in a chain of circumstances which connects the defendant with the crime charged, it is admissible. In such case, in order that one act may be evidence of another, there must be some connection between them which may be traced in a general design, purpose or plan of the person doing the act, or which may be shown by such circumstances as necessarily tend to establish that the person who committed one act must have been guilty of the other . . .* If facts offered to be proved bear on the offense charged and tend to prove a fact in issue . . . such proofs are admissible even though they incidentally tend to prove the commission of another offense.' " (Emphasis supplied.)

It is crystal clear that the act of sodomy, committed by petitioner upon the prosecutrix at the same time and place as he engaged in intercourse with her, constituted part of the same transaction or occurrence which led to his being charged with rape. The act of sodomy was inextricably intertwined with the chain of circumstances surrounding the crime for which he was charged. Indeed, it was a similar sexual assault upon the same victim. The Commonwealth submits that this evidence was prop-

erly admitted as it necessarily tended to establish petitioner's commission of the act of rape and his singular purpose and intent to assault the prosecutrix sexually.

Moreover, petitioner's argument on this point has not been properly preserved for appeal. Petitioner's trial counsel made no objection to the omission from the court's charge as to this alleged error. The Pennsylvania Rules of Criminal Procedure clearly provide that the failure to make a specific objection to any omission from the court's charge precludes a defendant from raising the omission as error. The rule states:

> "No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury." Pa. Stat. Ann. Tit. 19, Appendix, Pa. R. Crim. P. 119(b) (Supp. 1970).

VIII. The Creation of a Rebuttable Presumption in Favor of the Good Reputation of the Prosecutrix in a Trial for Statutory Rape Does Not Relieve the Commonwealth of its Burden of Proving All of the Elements of the Crime Beyond a Reasonable Doubt and Does Not Create Constitutional Error

---

The respondent submits that no constitutional infirmity is caused by the creation of a rebuttable presumption of the good reputation of a prosecutrix. This rebuttable presumption in favor of the prosecutrix' good reputation in no way creates a presumption—rebuttable or

conclusive—in favor of the Commonwealth with respect to any of the elements of the offense of statutory rape. All of these elements must, of course, be proven by the Commonwealth beyond a reasonable doubt and without the aid of any presumption which would be contrary to the presumption of innocence favoring the accused. The presumption here complained of by petitioner is relevant only to the statutorally recognized defense to the charge of statutory rape. Thus it does no more than place upon defendant the burden of proving his defense.

CONCLUSION

Respondent respectfully submits that the conviction of petitioner should be affirmed, that petitioner has raised no constitutional question meriting review by this Honorable Court and that the Petition For Writ Of Certiorari to the Superior Court of Pennsylvania should therefore be denied.

Respectfully submitted,
JESS D. COSTA,
District Attorney,
ROGER J. ECKER,
Assistant District Attorney,
Washington County, Pa.,
Attorneys for Respondent.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 9 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

No. 276 October Term, 1970

PETER PARIS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

REPLICATION TO ANSWER OF COMMONWEALTH OF PENNSYLVANIA

PETER PARIS,
Petitioner.

903B Grant Building,
Pittsburgh Pa. 15219.

Merrelle Printing Co., Law Printers, Box 188, Sayre, Pa. 18840

TABLE OF CONTENTS

	Page
Argument	1
Conclusion	3
Appendix:	
Excerpts From Transcript	4
Order	9

REPLICATION TO ANSWER OF COMMONWEALTH OF PENNSYLVANIA

A. On page 7 of its Answer the Commonwealth declares:

"If it had been the case that Petitioner was not involved in the act alleged and if Petitioner wished to testify to the effect that the prosecutrix had incorrectly identified petitioner rather than Serafin as the actual assailant, a conflict of interest could have arisen by virtue of the dual representation."

Examination of the Serafin trial transcript filed in the Court of Quarter Sessions of Washington County, Pennsylvania at No. 227 September Sessions, 1967 discloses that John F. Bell, Esquire, made an identification motion at pp. 61-62 of the record as follows (see Appendix hereto):

"Your Honor, if that's the case, I would like to have any identification of the Defendant Serafin suppressed also with an independent hearing for the reason that the police lineup, there's evidence that she could not identify Serafin until the third time she was brought into the room. Also, there was evidence there may have been suggestions as to who he was and if it deprived him of his constitutional rights, and also, I feel at this time that at the police lineup, it has gone beyond the interrogation stage and was in the accusatory stage and, therefore, he was without counsel."

In fact, habeas corpus was granted on petition of Robert Ray Ragazzini in the United States District Court for the Western District of Pennsylvania by Senior Judge Wallace S. Gourley on this very issue with an order that Ragazzini must be retried in 60 days or be released. See Civil Action No. 70-548 in the United States District Court for the Western District of Pennsylvania, United States of America ex rel. Robert Ray Ragazzini v. Joseph Brierley, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania.

It is apparent that the same counsel represented two defendants, one of whom took the stand and admitted the other was present whereas the other did not take the stand and denied he was present.

Certainly this is a sufficient conflict to vitiate representation.

B. On page 6 of his Answer, the prosecutor declares "only Kusturiss represented petitioner at his separate trial."

However, the Docket Entries at 1a indicate that on October 9, 1967, both Kusturiss and John F. Bell were present when the jury was sworn.

C. On page 7 of his Answer, the prosecutor declares Paris ". . . in no way implicated Serafin." However 247a of the record discloses the contrary:

"Q. Now, isn't it true that the only real buddies you had there that evening were Ragazzini and Serafin?

A. Well, they were my buddies, yes.

• • • • • • • •

Q. Who else went with you? Ragazzini and Martin and who else?

A. Serafin, Ragazzini." (240a)

CONCLUSION

It is respectfully submitted that by the very admission of the Prosecutor that this Honorable Court should grant certiorari and reverse.

Respectfully submitted,
PETER PARIS,
Petitioner, Pro. Persona.

APPENDIX

EXCERPTS FROM TRANSCRIPT

. . . . . .

(61) make an independent hearing on the identification of the defendant Ragazzini at the police lineup. Trooper Stouffer previously admitted that she could not identify the defendant Ragazzini and that there were no other lineups held, and that therefore under the recent cases, it would be incumbent upon your Honor to determine exactly the manner this witness made her identification of the defendant Ragazzini before she testified to the jury.

MR. TOWNSEND: Your Honor, I think Mr. Bloom's motion is premature in that the witness is going to identify Serafin, not Ragazzini.

MR. BELL: Your Honor, if that's the case, I would like to have any identification of the defendant Serafin suppressed also with an independent hearing for the reason that the police lineup, there's evidence that she could not identify Serafin until the third time she was brought into the room. Also, there was evidence there may have been suggestions as to who (62) he was and if it deprived him of his constitutional rights, and also, I feel at this time that at the police lineup, it has gone beyond the interrogation stage and was in the accusatory stage and, therefore, he was without counsel.

MR. TOWNSEND: The Commonwealth is not going to introduce any evidence of the police lineup.

BY THE COURT: In other words, you're telling me that you're not going to rely on the lineup identification.

MR. TOWNSEND: That is correct.

MR. BELL: It is only because of the police lineup and the identification there that she can identify the defendant Serafin today in in-court identification.

BY THE COURT: It seems to me that we have got two things a little mixed up. Identification of who was present and identification of who had intercourse with her, and we may have some trouble in keeping those straightened out as we go along. Does anybody seriously (63) contend that this man was not present, as opposed to did not have intercourse with her?

MR. BELL: I think we are putting the car before the horse.

BY THE COURT: Well, now, I've asked if anybody seriously contends that this man was not present.

MR. BLOOM: The defendant Ragazzini seriously contends that the Commonwealth cannot prove beyond a reasonable doubt that the defendant Ragazzini was even there.

BY THE COURT: That is a sort-of double negative, Mr. Bloom. Do you say that it's Ragazzini's position that he wasn't even there?

MR. BLOOM: If the Court please, it is not incumbent on the defendant to take any position at all at this time, except to force the Commonwealth to its burden of proof and the fact that the Commonwealth intends to

hide the police lineup certainly should be enough to seriously alert your Honor that there is something wrong with what took place there.

(64) BY THE COURT: This lineup is like getting a statement. You can't use a statement that isn't Miranda-antiseptic. You can't use a lineup that doesn't conform to the latest ruling, but the fact that an improper statement was taken or an improper lineup held, does not of itself immunize a defendant from prosecution. It protects you from the use of proof of or gained by such improper statement or improper lineup.

MR. BLOOM: That is exactly the point of the defendant Ragazzini, your Honor. At the police lineup, he was present for a lineup. The victim could not identify him as either being there or as anyone who assaulted her. Suddenly, she comes into court and through the District Attorney's opening statement, will identify the defendant Ragazzini as both being there and as having intercourse (65) with her. This would certainly alert the Court that there is something wrong.

BY THE COURT: All right, now. As far as Ragazzini is concerned, this is premature. Now, for Serafin,—are you prepared to have her identify Serafin as present without recourse to the lineup?

MR. TOWNSEND: Yes, we are.

BY THE COURT: All right, now, I'm going ahead on that basis, but if it turns out that she cannot or won't, you understand you're going to be in trouble, Mr. Townsend. Now, I'm going to rely on your statement at the moment.

MR. BLOOM: Does the Court mean that there is an independent identification here other than her seeing the defendants at the lineup?

BY THE COURT: I'm going to let him put it in the way he wants to, and we'll play it by that, but if he falls back on a lineup identification, then we have to take the jury out and hear about the lineup out of the hearing of the jury.

(66) MR. BLOOM: Would that mean, your Honor, then, that there was some time before the lineup that she was able to identify—

BY THE COURT: Now, just a minute. You don't want to take any position on some things and wrap the constitutional mantle around you, but then you want to cross-examine me on the prosecution's case.

MR. BELL: Is the identification of the defendant Serafin going to be based entirely on an in-court identification here today?

BY THE COURT: I think he's entitled to develop it his own way.

MR. TOWNSEND: I'm going to ask her if Marion Serafin was one of the boys who got out of the car and she is going to reply, "Yes." She will state she did not know his name at that time. Her identification was that night; his name comes later.

BY THE COURT: I think that's all right. You can identify a (67) person without knowing his name. Let's go ahead.

(End, side bar conference.)

BY THE COURT: Mr. Brovey, take the jurors back to No. 2. Pause for a minute until we move them.

(Side bar conference resumes as panel of jurors leave room.)

MR. FINDER: The same ruling applied to Evans?

BY THE COURT: I don't think there is any trouble. She knew him before; she was standing on the street corner with him. I didn't assume we had any identification problem with him. If the Commonwealth has to use a police lineup on him, we'll have the same ruling on him, too. The first confrontation with Evans took place on a street corner in Houston and she rode out there in an automobile with him. The other people she met, apparently, under unpleasant circumstances, so it's different.

* * * * * * * * *

Order

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 70-548

United States of America ex rel. Robert Ray Ragazzini

v.

Joseph Brierley, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania

* * * * * * * * *

ORDER

Now, this 17th day of November 1970, it is hereby ordered that a Writ of Habeas Corpus shall issue in the event that relator is not afforded a new trial within sixty days of the date of this Order, unless extended for just cause by this Court.

(s) Wallace S. Gourley,
Senior District Judge.